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ON

COSTS OF ACTIONS
IN
QUEEN'S BENCH
DIVISION.

W. E. GORDON.

Demy 8vo., Cloth, Price 12s. 6d.

THE
LAW & PRACTICE
UNDER
THE BANKRUPTCY ACT
And Rules, 1883,

WITH
THE DEBTORS ACT, 1869,
AND
The Bills of Sale Acts 1878 and 1882,

WITH NOTES, CASES, AND INDEX,

BY
F. ROXBURGH, B.A., LL.M.,

Of the Middle Temple, Barrister-at-Law.

London: KNIGHT & CO., 90 Fleet Street.



IN THE PRESS FOR EARLY ISSUE.

Lloyd's
Practice of the Supreme Court,

Being a Collection of the Statutes and Rules

RELATING TO THE

*Jurisdiction and Practice of the Chancery, Queen's
Bench, and Admiralty Divisions of the High Court
of Justice, and on Appeal to the Court of
Appeal, and House of Lords.*

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and a copious Index.

BY

CLEMENT ELPHINSTONE LLOYD,

Of the Inner Temple, Barrister-at-Law.

EDITOR OF "LLOYD'S COUNTY COURT PRACTICE," ETC.

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A TREATISE
ON
THE LAW OF COSTS
IN AN ACTION IN
THE QUEEN'S BENCH DIVISION
AND IN
THE COURT OF APPEAL
UNDER THE
JUDICATURE ACTS AND RULES OF THE SUPREME COURT

BY
WILLIAM EDWARD GORDON, M.A.
BARRISTER-AT-LAW OF THE SOUTH-EASTERN CIRCUIT AND OF THE
MIDDLE TEMPLE

LONDON
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P R E F A C E.

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MORE than twenty years having elapsed since the publication of the leading treatises upon the law of costs by the late Mr. John Gray and the late Mr. Walker Marshall, and the law relating to the costs of an action in the Queen's Bench Division having been materially affected by the Judicature Acts and Rules of the Supreme Court and by recent decisions, the present time seems to afford a convenient opportunity for a new treatise upon the subject.

The key-note to the present work is contained in a passage in the judgment of *Lord Justice* (now Lord) *Bramwell* in the case of *Myers v. Defries* (5 Ex. D. at p. 184) that although "the old law as to costs is gone, we may look upon it as a guide; for the former rules as to apportioning the liability for costs were in themselves reasonable, and ought to be followed wherever it is practicable." Keeping the words of the learned Lord Justice in view, the author has made such a selection of the earlier decisions, statutes, &c., which dealt with questions relating to costs arising prior to the passing of the Judicature Acts as appear to be useful for the purpose of solving questions of a similar nature likely to arise in the future. For this reason reference has frequently been made to the Common Law Procedure Acts and many of the *Regulæ Generales* issued under those Acts, although they are now repealed or annulled.

The principles upon which the law of costs is founded are those laid down by former writers on the subject, and the author is desirous of acknowledging the great assistance he has received

from them, and in particular from a work entitled *The Practice of the Master's Office* by the late Mr. Thomas Dax.

The Rules of the Supreme Court have been collected under the various heads of the subject matters to which they relate. As several of the rules, however, make provision for different matters, it necessarily happens that the same rule is in certain cases set out more than once in the work, and a table of the rules cited has, therefore, been compiled for reference and will be found at page xxiii. All the rules of court which directly refer to costs have been cited in the body of the work, and in the appendices will be found a selection of forms relating to costs given in the appendix to the Rules of the Supreme Court, 1883, as well as the scale of costs in the Supreme Court, the County Court scale of costs, and the recently published Order as to Supreme Court fees which has been given in its entirety. It has been thought unnecessary to insert any precedents of Bills of Costs, inasmuch as only a few precedents could be given, and the recent edition of *Precedents of Bills of Costs*, by Messrs. Summerhays and Toogood, contains all the information necessary for the purpose of drawing bills.

Attention is called to the "addenda," in which will be found all the cases relating to costs which have been decided at Judges' Chambers down to the most recent date.

In conclusion, the author desires to acknowledge the obligation under which he lies for the assistance given to him by his father—Master Gordon—one of the masters of the Queen's Bench Division, whose long practical experience of the subject renders the aid thus afforded of especial value.

W. E. G.

3, ELM COURT, TEMPLE.
February, 1884.

CONTENTS.



	PAGE
PREFACE	iii
TABLE OF CASES	xi
TABLE OF STATUTES	xxi
TABLE OF RULES OF SUPREME COURT	xxiii
TABLE OF REGULÆ GENERALES	xxvii
ADDENDA ET CORRIGENDA	xxix

CHAPTER I.

COSTS OF AN ACTION IN GENERAL	I
---	---

CHAPTER II.

COSTS WHERE ACTION TRIED WITH A JURY	9
--	---

CHAPTER III.

RE-EFFECT OF THE "COUNTY COURTS ACT, 1867," UPON COSTS	20
--	----

CHAPTER IV.

COSTS IN PARTICULAR ACTIONS	35
---------------------------------------	----

CHAPTER V.

COSTS ON AWARDS	50
---------------------------	----

CHAPTER VI.

PAYMENT INTO AND OUT OF COURT AND TENDER	58
--	----

CHAPTER VII.	
SECURITY FOR COSTS	PAGE 70
CHAPTER VIII.	
PROCEEDINGS IN LIEU OF DEMURRER	92
SPECIAL CASE	95
ISSUES OF FACT WITHOUT PLEADINGS	96
CHAPTER IX.	
COSTS OF DISCONTINUANCE	98
CHAPTER X.	
NONSUIT—NOLLE PROSEQUI—STET PROCESSUS	105
CHAPTER XI.	
JUDGMENT BY DEFAULT (1) OF APPEARANCE	109
" " (2) OF PLEADING	112
CHAPTER XII.	
STAYING PROCEEDINGS ON PAYMENT OF DEBT AND COSTS	116
LEAVE TO SIGN JUDGMENT OR DEFEND WHERE WRIT SPECIALLY INDORSED	118
CHAPTER XIII.	
PARTIES GENERALLY	121
THIRD PARTY PROCEDURE	124
CHAPTER XIV.	
COSTS OF VARIOUS MATTERS WHICH DO NOT DEPEND UPON THE EVENT OF THE ACTION	127
CHAPTER XV.	
COSTS OF MISCELLANEOUS MATTERS	133
CHAPTER XVI.	
COSTS OF MOTIONS	142

Contents.

vii

CHAPTER XVII.

	PAGE
COSTS OF THE DAY	145

CHAPTER XVIII.

COSTS OF THE CAUSE	149
------------------------------	-----

CHAPTER XIX.

COSTS OF VIEW AND SPECIAL JURY	153
--	-----

CHAPTER XX.

COSTS IN THE COURT OF APPEAL	158
--	-----

CHAPTER XXI.

COSTS OF ISSUES	163
---------------------------	-----

CHAPTER XXII.

POWERS AND AUTHORITY OF THE MASTERS IN RELATION TO THE TAXATION OF COSTS	168
---	-----

CHAPTER XXIII.

TAXATION OF COSTS	174
-----------------------------	-----

CHAPTER XXIV.

THE MODES OF TAXATION.	184
--------------------------------	-----

CHAPTER XXV.

ALLOWANCES UPON TAXATION OF COSTS	192
---	-----

CHAPTER XXVI.

SET-OFF OF COSTS AND SOLICITOR'S LIEN	230
---	-----

CHAPTER XXVII.

ACTION BY SOLICITOR ON HIS BILL OF COSTS	235
--	-----

CHAPTER XXVIII.

COSTS OF INTERPLEADER AND ATTACHMENT OF DEBTS . . .	PAGE 244
---	-------------

CHAPTER XXIX.

EXECUTION	249
---------------------	-----

CHAPTER XXX.

ACTION TO RECOVER COSTS AS DAMAGES	256
--	-----

APPENDIX.—PART I.

APPENDIX OF FORMS UNDER THE RULES OF THE
SUPREME COURT, 1883.

APPENDIX A.—PART III.

Sect. III.—Indorsement for costs	261
--	-----

APPENDIX F.—FORMS OF JUDGMENT.

Default in case of liquidated demand	261
Default of appearance in action for recovery of land	262
Default of appearance and defence after assessment of damages	262
Judgment after appearance and Order under Order 14, r. 1	262
Judgment after trial with a Jury	263
Judgment after trial of questions of account by referee	263
Judgment after trial by Court without Jury	263
Judgment in pursuance of Order	264
Judgment on Certificate of Registrar of County Court	264
Judgment for defendant's costs on discontinuance	264
Judgment for plaintiff's costs after confession of defence	265
Judgment for costs after acceptance of money paid into Court	265
Judgment where no judgment entered at trial by Jury	265
Judgment on motion after trial of issue	266

APPENDIX H.—FORM OF WRIT.

Fieri Facias on Order for costs	266
---	-----

Contents.

ix

APPENDIX K.

	PAGE
Order for directions pursuant to Order 30	267
Order under Order 14, No. 1	267
" " No. 3	268
Order to dismiss for want of prosecution	268
Charging order—Solicitor's costs	268
Order on Client's application to tax Solicitor's bill of costs	269
Order on Solicitor's application to tax bill of costs	269
Order to tax after action brought	270
Order to give security or try action in County Court	271
Interpleader Order, No. 3	271
" " No. 4	272
" " No. 5	272
Order dismissing summons (generally)	273
Rules of Order 22 relating to payment into and out of Court	273

APPENDIX M.

Payment into and out of Court	274
---	-----

APPENDIX N.

COSTS.

Writs, summons, and warrants	278
Services and notices	279
Appearances	281
Instructions	281
Drawing Pleadings and other Documents	282
Copies	283
Perusals	284
Attendances	285
Oaths and exhibits	288
Term fees	288

APPENDIX O.

Repealed Rules of Court and Orders	289
Form of Allocatur	290

APPENDIX.—PART II.

COUNTY COURT SCALE OF COSTS AND CHARGES.

	PAGE
I.—Where amount recovered exceeds 40s. and does not exceed £5 .	291
II.—Where amount recovered exceeds £5 and does not exceed £10 .	291
III.—Where amount recovered exceeds £10 and does not exceed £20 .	292
Costs in actions above £20	293
Occasional costs	294
Case	296
Costs of the day on adjournment of cause	297
Arbitration	297
New trial	297
Costs on Appeals	297
Counter or other claim	298
Allowances to witnesses under the County Court Rules	298
Old scale of allowance to witnesses in High Court	299
The Practice Masters' Rules	300

APPENDIX.—PART III.

Table of Sheriff's fees	303
Order for taking fees by stamps (28 October, 1875)	306
" " " (22 April, 1876)	307
Amending Order for taking fees by stamps (12 July, 1881)	319

APPENDIX.—PART IV.

Order as to Supreme Court fees	323
Fixed costs in cases of Judgment by default	339
INDEX	341

TABLE OF CASES.

—o—

A.		PAGE		PAGE
ABBOTT <i>v.</i> ANDREWS . . .	106,	165	Barlow <i>v.</i> Briggs . . .	32
Abley <i>v.</i> Dale . . .	. . .	93	Barrett <i>v.</i> Power . . .	71
Ackroyd <i>v.</i> Read . . .	. . .	118	Bartholomew <i>v.</i> Stephens	167, 209, 210
Adamson <i>v.</i> Noel . . .	. . .	215	Bastard <i>v.</i> Smith . . .	218
Alchin <i>v.</i> Wells . . .	. . .	251	Batley <i>v.</i> Kynoch . . .	218
Alderson <i>v.</i> Waistell . . .	. . .	166	Bawden <i>v.</i> Roe . . .	75
Alexander <i>v.</i> Townley . . .	80,	82	Baxendale <i>v.</i> London Chatham and Dover Railway Company . . .	259
„ <i>v.</i> Williams . . .	. . .	175	Bayley <i>v.</i> Beaumont . . .	218
Allen <i>v.</i> Yoxall . . .	. . .	216	Baylis <i>v.</i> Lintott . . .	22, 24
Allenby <i>v.</i> Proudlock . . .	. . .	167	Beale <i>v.</i> Overton . . .	246
Allport <i>v.</i> Baldwin . . .	. . .	215	Beard <i>v.</i> Perry . . .	27
Ames <i>v.</i> Ragg . . .	. . .	99	Beaufort (Duke of) <i>v.</i> Ashburnham (Earl of) . . .	140, 218, 228
Amos <i>v.</i> Cuthbert . . .	. . .	107	Beaufort (Duke of) <i>v.</i> Welch . . .	57
Anderson <i>v.</i> Ward . . .	. . .	37	Becke <i>v.</i> Cattell . . .	241
Andrew, <i>In re</i> . . .	232,	233	Beckham <i>v.</i> Knight . . .	78, 81
Andrews <i>v.</i> Marris . . .	80,	81	Bedwell <i>v.</i> Wood . . .	51
Angus <i>v.</i> Coppard . . .	. . .	202	Beeton <i>v.</i> Jupp . . .	100
Anon (Barnes) . . .	. . .	60	Bell <i>v.</i> Aitkin . . .	195
„ (2 Chitt. 152) . . .	. . .	71	„ <i>v.</i> Postlethwaite . . .	19, 51
„ (8 Taunt. 737) . . .	. . .	71	Belmonte <i>v.</i> Aynard . . .	85
„ (7 Taunt. 307) . . .	. . .	75	Benazeck <i>v.</i> Besset . . .	85
„ (1 Dowl. 300) . . .	. . .	75	Benecke <i>v.</i> Frost . . .	124
Ansett <i>v.</i> Marshall . . .	. . .	221	Benge <i>v.</i> Swaine . . .	99
Archer <i>v.</i> James . . .	. . .	158	Benson <i>v.</i> Schneider . . .	216
„ <i>v.</i> Marsh . . .	. . .	195	Bentley <i>v.</i> Carver . . .	151
Armitage <i>v.</i> Grafton . . .	. . .	78	„ <i>v.</i> Dawes . . .	93, 94
„ <i>v.</i> Jessop . . .	. . .	22	Berdan <i>v.</i> Greenwood . . .	61, 64
Ashcroft <i>v.</i> Foulkes . . .	26,	30	Berry <i>v.</i> Exchange Trading Co. . .	143
Ashworth <i>v.</i> Outram . . .	. . .	227	„ <i>v.</i> Pratt . . .	220
Aste & Co. <i>v.</i> Stumore & Co. <i>addenda</i>			Berton <i>v.</i> Lawrence . . .	252
Attenborough <i>v.</i> St. Katherine Docks Co. . .	. . .	244	Best <i>v.</i> Pembroke . . .	247
Avard <i>v.</i> Rhodes . . .	. . .	27	Beynon <i>v.</i> Godden . . .	158
B.			Bigsby <i>v.</i> Dickinson . . .	227
Bagnall <i>v.</i> Underwood . . .	135,	215	Billing <i>v.</i> Coppock . . .	241
Baines <i>v.</i> Bromley . . .	17,	165	Birchall <i>v.</i> Pugin . . .	233
Baker <i>v.</i> Oakes . . .	. . .	5, 6	Birchman <i>v.</i> Wright . . .	86
Ball <i>v.</i> Adrian . . .	. . .	75	Bishop <i>v.</i> Hinxman . . .	246
Balmain <i>v.</i> Lickfold . . .	. . .	27	Bissicks <i>v.</i> Bath Colliery Co . . .	251
Barker <i>v.</i> Birch . . .	. . .	180	Blake <i>v.</i> Appleyard 14, 15, 16, 19, 22, 34 „ <i>v.</i> Newborn . . .	252
„ <i>v.</i> Braham . . .	. . .	231	Blood <i>v.</i> Lee . . .	43
„ <i>v.</i> Hemming . . .	. . .	231	Blow <i>v.</i> Wyatt . . .	146
„ <i>v.</i> St. Quintin . . .	. . .	232	Blunt <i>v.</i> Heslop . . .	235
			Blyth, <i>In re</i> . . .	189, 190, 199, 228

	PAGE		PAGE
Blyth <i>v.</i> Smith	258	Chappell <i>v.</i> Watts	72
Bolton <i>v.</i> Manning	174	Chatfield <i>v.</i> Sedgwick	19, 30, 53, 54, 55, 56, 57
Borghs <i>v.</i> Sessions	89	Chevalier <i>v.</i> Finnis	77
Bostock <i>v.</i> North Staffordshire Railway Co.	167	Child <i>v.</i> Stenning	122
Boulding <i>v.</i> Tyler	26 61	Chinn <i>v.</i> Bullen	23, 43
Bowditch <i>v.</i> Slaney	117	Christie <i>v.</i> Richardson	155
Bowdler <i>v.</i> Smith	245	„ <i>v.</i> Thompson	175
Bower <i>v.</i> Hartley	124	Churton <i>v.</i> Frewen	216, 218
Bowey <i>v.</i> Bell	6	Ciragno <i>v.</i> Hassan	71, 89
Boyes <i>v.</i> Black	155	Clark <i>v.</i> Dann	118
Bradford, <i>In re</i>	7, addenda	„ <i>v.</i> Malpas	208
Bray <i>v.</i> Hine	232	„ <i>v.</i> Smith	231
Brazil (Emperor of) <i>v.</i> Robinson	73	Clarke <i>v.</i> Hart	4
Brewer <i>v.</i> Jones	252	„ <i>v.</i> Owen	57
Bristowe <i>v.</i> Needham	230	„ <i>v.</i> Tyne Improvement Commissioners	182
Brocklebank <i>v.</i> King's Lynn St. Sh. Co.	90	Cleaver <i>v.</i> Hargreave	180
Brown <i>v.</i> North	41, 85	Cliffe <i>v.</i> Prosser	190, 191
„ <i>v.</i> Shaw	144	Clifton <i>v.</i> Davis	246
„ <i>v.</i> Tibbits	235	Clothier <i>v.</i> Dann	163, 216
Brunsdon <i>v.</i> Allard	231	Clover <i>v.</i> Adams	233
Bryant <i>v.</i> Herbert	24	Cobbett <i>v.</i> Warner	47, 87
Brydges <i>v.</i> Smith	231	Cole <i>v.</i> Beale	71
Buckland <i>v.</i> Johnson	129	„ <i>v.</i> Firth	19 28, 33 53, 54
Buckle <i>v.</i> Bewes	214	„ <i>v.</i> Beardy	88
Bucknall <i>v.</i> Boydell	229	„ <i>v.</i> Terry	252
Buckton <i>v.</i> Higgs	12, 63, 64	Collen <i>v.</i> Wright	258
Burch <i>v.</i> Pointer	174	Collins <i>v.</i> Aaron	132, 148
Burdon <i>v.</i> Flower	167	„ <i>v.</i> Brook	189
Burr <i>v.</i> Hubbard	addenda	„ <i>v.</i> Godefroy	217
Burrell <i>v.</i> Jones	191	„ <i>v.</i> Welch	5, 7, 10
Burton <i>v.</i> Burton	180, 181	Collyer <i>v.</i> Isaacs	228
Butler <i>v.</i> Hobson	195, 216	Constantine, The	160
„ <i>v.</i> Meredith	87	Cooch <i>v.</i> Maltby	27
Bye <i>v.</i> Kirby	addenda	Cooke <i>v.</i> Gillard	242
C.		Cooper <i>v.</i> Boles	104, 198, 201
C. <i>v.</i> D.	245	„ <i>v.</i> Pegg	52
Cain <i>v.</i> Adams	167	Cooth <i>v.</i> Jackson	4
Caine <i>v.</i> Coulson	222	Cornet <i>v.</i> Dempsey	140
Callender <i>v.</i> Hawkins	101	Corticene Floor Covering Co. <i>v.</i> Tull	178
Calvert <i>v.</i> Davison	addenda	Cosgrave <i>v.</i> Evans	219
„ <i>v.</i> Scinde	220	Cotter <i>v.</i> Bank of England	244
Cameron <i>v.</i> Reynolds	105, 106	Cotterell <i>v.</i> Jones	186, 256
Capel <i>v.</i> Staines	222	Counsel <i>v.</i> Garvie	80
Carpenter <i>v.</i> Calvert	183	Cowan's Estate, <i>In re</i>	247
Carr <i>v.</i> Edwards	246	Cowell <i>v.</i> Amman Colliery Co.	23
„ <i>v.</i> Shaw	88	„ <i>v.</i> Betteley	231
Carter <i>v.</i> Burial Board of Tonge	52	„ <i>v.</i> Simpson	232
„ <i>v.</i> Hughes	253	Cox <i>v.</i> Peacock	36
Casey <i>v.</i> Tomlin	43	Cox <i>v.</i> Robinson	61
Catlow <i>v.</i> Catlow	233	Cracknall <i>v.</i> Janson	226
Chamberlain <i>v.</i> Chamberlain	77	Crampton <i>v.</i> Walker	235
Champ <i>v.</i> Stokes	241	Craven <i>v.</i> Smith	32
Chapman, <i>In re</i>	207	Green <i>v.</i> Wright	10, 11, 142
„ <i>v.</i> Midland Railway Co.	177	Cremetti <i>v.</i> Crom	247
„ <i>v.</i> Rodway	195, 216	Croomes <i>v.</i> Gore	228
		Crosby <i>v.</i> Olorenshaw	65

Table of Cases.

xiii

	PAGE		PAGE
Cross v. Durrell	176, 221	Doe d. Smith v. Webber	164, 217
Crosse v. Seaman	27	Dow v. Clark	37
Crowle v. Russell	87	Dowdell v. Australian R. M. St. N. Co	220
Crowther v. Elwell	165	Dowling v. Harman	71, 88
Cruickshanks v. Floating Baths Co. . . .	51	Doyle v. Anderson	81
Curling v. Robertson	139	Dresser v. Norman	156
Curtis v. Mayne	252	Drummond v. Tillinghist	74
„ v. Platt	104, 207	Duckett v. Satchell	84
Cusack v. Jones	86	Duear v. Mackintosh	244
Cusel v. Pariente	244	Dufaur v. Sigel	4
D.		Dugan v. Stint	89
Dabbs v. Humfries	246	Dunhill v. Ford	52
Danby v. Lamb	24	Dunston v. Paterson	93, 94
Daniel v. Wilkin	103, 104, 218	Durell v. Matheson	74
Dansey v. Richardson	143	E.	
Daubney v. Shuttleworth	144	Eades v. Evarett	215
Davidson v. Gray	16, 18	Eccles v. Mayor of Blackburn	180, 219
Davies v. Edmonds	251	Edgington v. Proudman	100, 102
„ v. Griffiths	251	Edinburgh and Leith Railway Co. v. Dawson	75, 88, 89
„ v. Stevens	addenda	Edwards, <i>ex parte</i>	233
Davila v. Herring	105	Edwards v. Bethel	35
Davis v. Thomas	215	„ v. G. W. R. Co. . . .	151, 223
Dawson v. Shepherd	126	Eisdell v. Coningham	234
Day v. Smith	78	Elan v. Rees	70
„ v. Vinson	133	Elliott v. Kendrick	77, 80
Deacon v. Morris	214	Ellis v. De Silva	57
De Hart v. Stevenson	124	Elliston v. Robinson	117
De la Preuve v. Duc de Biron	88	Elwood v. Bullock	102
De la Warr (Earl) v. Miles	227	„ v. Butcher	94
Delisser v. Towne	150	Emerson v. Lashley	231
Deller v. Prickett	86	Emery v. Webster	62
De Marneffe v. Jackson	70	Empson v. Fairfax	215
Demontallano (Duke of) v. Christin	73	Englehart v. Moore	242
Dennis v. Seymour	119	Etty v. Wilson	106
Denston v. Ashton	77	Evans v. Davis	36
Denton v. Williams	81	„ v. Edwards	addenda
Dhormasjee v. Grey	75, 121	„ v. Watson	220
Dicks v. Yates	4	Eveleigh v. Salisbury	246
Dignam v. Bailey	163	Evering v. Chittenden	72
Dix v. Groom	113	Eyre v. Shelley	242
Dixon v. Ensell	246	„ v. Thorpe	150, 163
„ v. Lee	217	F.	
Doe v. Brood	89	Farmer v. May	18, 32
Doe d. Brayne v. Buther	87	Fazakerley v. Rogerson	164, 209
„ Colnaghi v. Blick	81	Fearon v. Flinn	4
„ Cupps v. Cupps	117	Fergusson v. Davison	23
„ Davies v. Morgan	150	Ferrars (Earl) v. Robins	73
„ Ellis v. Owen	43	Field v. Carrow	79
„ Hamilton v. Hatherley	87	„ v. G. N. R. Co. . . .	10, 103, 142
„ Heighley v. Harland	87	Fisher v. Berrell	215
„ Hope v. Carter	230	„ v. Val de Travers Asphalte Co. . . .	259
„ King v. Robinson	178		
„ Langdon v. Langdon	47, 87		
„ Linsey v. Edwards	43		
„ Peters v. Peters	135		
„ Postlethwaite v. Neale	104, 198, 201, 207		

		PAGE			PAGE
Fleming v. Manchester & Sheffield			Gibbs v. Ralph		
Railway Co.			24, 25	Goatley v. Emmott	
Fletcher v. Lew			89	Goddard v. Smith	
Flitters v. Allfrey			22	Godwin v. Francis	
Flower v. Gardner			216	Golding v. Wharton Salt Works	
Ford v. Boucher			74	Co.	
" v. Dilly			245	Goodall v. Ray	
" v. Stock			99	Goodee v. Goldsmith	
Forshaw v. De Wette			22, 23, 52	Goodhand v. Ayscough	
Foss v. Facine			44	Goodright v. Thrustout	
" v. Wagner			71	Goodwin v. Archer	
Foster v. Bank of England			43	" v. Cremer	
" v. Blakelock			252	Gordon v. Strange	
" v. Colby			90	Gougenheim v. Lane	
" v. Edwards			8	Gould v. Barratt	
" v. Gamgee			101	" v. Davis	
" v. G. W. R. Co.			4	Goutard v. Carr	
" v. Roundall			79	Gover v. Elkin	
" v. Underwood			26, 27	Grace v. Clinch	
Fowler v. Bank of England			43	" v. Morgan	
" v. Knoop			124	Grant v. Banque Franco-Egyptienne	
" v. Monmouthshire Canal			186, 235	Grant v. Holland	
Co.			189	Gravatt v. Attwood	
Foy v. Cooper			189	" v. Hall	
Francis v. Webb			232	Gray v. West	
Fray v. Voules			43	Grazebrook v. Pickford	
Freeman v. Rosher 135, 163, 176, 221				Great Northern Committee v. Inett	
" v. Springham 198, 201, 207				Greaves v. Eastern Counties R. Co.	
" v. Steggall			134	" v. Fleming	
French v. Maule			89	Greece (King of) v. Wright	
Freshney v. Wells			164	Green v. Briggs	
Friend v. L. C. & D. R. Co.			144	Gregory v. Duke of Brunswick 93, 230	
Frodsham v. Myers			71	" v. Eldridge	
Frost v. Heywood			86	Gribble v. Buchanan	
" v. London Brighton & S. C.				Gridley v. Austen	
R. Co.			157	Griffin v. Hoskyns	
Fullalove v. Parker			186, 187	Griffiths v. Jones	
Fryer v. Sturt			215, 219	" v. Kynaston	
				Grindall v. Goodman	
G.				Guéret v. Young	
Gage v. Collins			158	Gulliver v. Drinkwater	
Galatti v. Wakefield			23, 52, 54	Gurney v. Key	
Galloway v. Keyworth			215, 220		
Gambrell v. Earl of Falmouth			166, 210	H.	
Games, <i>ex parte</i>			232	Hadley v. Perks	
Ganesford v. Levy			70	Haigh v. Ousey	
Gann v. Johnson			158	" v. Paris	
Gardiner v. Holt			37	Hall v. Liardet	
Garnett v. Bradley 1, 2, 3, 9, 18, 21				" v. Pritchett	
Garwood v. Bradburn			72	Hallinan v. Price	
Gell v. Curzon			88	Hammond v. Thorpe	
General Share Trust Co. v. Chapman				Hankin v. Turner	
			232	Hanley v. Cassam	
General Steam Navigation Co. v. London & Edinburgh Shipping Co.			5	Hammer v. Mangles	
George v. Elston			166, 230	Hansen v. Maddox	
Gibbons v. Griffiths			151	Hargreaves v. Scott	
				" v. Simpson	

Table of Cases.

XV

	PAGE		PAGE
Harmont v. Foster	7	Howarth v. Brown	98
Harnett v. Vise	5	Howes v. Barber	216
Harries, In re	238	Hudspath v. Yarnold	26
Harris v. Jewell	255	Hughes v. Birkenhead Improve- ment Commissioners	206
„ v. Petherick	3, 4, 5	Hughes v. Graeme	258
Harrison v. Bush	164	Humphreys v. Harvey	186
Hart v. Cutbush	163	Hunt v. Austin	233
Harvey v. Divers	219	Hunter v. Liddell	216
„ v. Jacob	71, 90	„ v. Russell	118
Haseltine v. Watkins	90	Huntley v. Bulmer	88
Hatch v. Lewis	32		
Hawkes v. Cottrell	37	I.	
Hawkesley v. Bradshaw	67	Ibbett v. De la Salle	257
Hawkins v. Rigby	208	Ilfracombe Conveyance Company, In re	182
Hazlewood v. Back	165	Imperial Bank of India v. Bank of Hindustan, &c.	89
Heaford v. M'Knight	78, 81	Insley v. Jones	27
Heald v. Hall	190	Irwine v. Reddish	38, 186
Heane v. Battersley	184	Iveson v. Conington	191
Henschen v. Garves	71, 74	Ivimey v. Marks	242
Heritage, In re	238	Ivory, In re	160
Hewison v. Guthrie	232		
Hewitt v. Cory	26	J.	
Higgs v. Schrader	233	Jacobs v. Stevenson	71, 74
Hill v. Fletcher	91	Jacquot v. Bourra	116
„ v. L. & S. W. R. Co.	167	James v. Hatfield	36
„ v. Metropolitan Asylum Dis- trict	227	„ v. Raggett	118
„ v. Peel	181, 206	„ v. Vane	27
„ v. Philp	138	Jamieson v. Trevelyan	38, 186
Hinde v. Sheppard	31, 32, 182	Jenkins v. Fereday	191
Hindsley v. Russell	36	Jennings v. Johnson	239
Hiskett v. Biddle	85	„ v. London General Omni- bus Co.	80
Hoare v. Coupland	42	Jervis v. Dewes	195
„ v. Dickson	44	Jewell v. Parr	140, 164, 215
Hocken v. Grenfell	57	Johnson v. Bowes	218
Hodding v. Starchfield	117	„ v. Diamond	180, 248
Hodges v. Earl of Lichfield	256	„ v. Mills	47
Hodgkinson v. Wyatt	215	Joliffe v. Munday	102, 103
Holborow v. Jones	32	Jones v. Bonner	232
Holderness v. Barkworth	183	„ v. Jacobs	90
Holdsworth v. Barsham	52	„ v. Jones	23, 88
Holland v. Henderson	108	„ v. Lewis	245
Holliday v. Lawes	230	„ v. Roberts	95, 184, 190
Holmes v. Holmes	135, 219	„ v. Thompson	247
„ v. Penney	44	„ v. Tobin	215
Holroyd v. Breare	231	„ v. Williams	143
Honiball v. Bloomer	48	Jubb v. Dibbs	addenda
Hood v. Bradbury	244	Judd v. Green	161
Hoole v. Earnshaw	117, 183	Jupp v. Grayson	52
Hooper v. Barnett	145		
Hope, The	231, 232	K.	
Hopkinson v. Smith	235	Kastern v. Plaw	74
Hore v. Saxl	118	Keene v. Angel	47
Hornby v. Cardwell	126, 257		
Horton v. Westminster, &c. Co.	148		
Horwell v. London Omnibus Co.	124		
Howard v. Lovegrove	126, 257		
Hough v. Edwards	234		
„ v. May	222		

	PAGE		PAGE
Keene v. Ward	242	Lovering v. Dawson	197
Kelcey v. Stupples	52	Lowe v. Holme	17
Kelly v. Byles	227	Lucas v. Fulford	86
Kemble v. Mills	71		
Kemp v. Finden	258	M.	
Kent v. G. W. R. Co.	151, 223	Macclesfield (Mayor of) v. Bradley or Baddeley	103
Kidston v. Empire Marine Insurance Co.	206	Macclesfield (Mayor of) v. Gee	94, 102
Kilkenny R. Co. v. Feilden	75	Mackintosh v. Blyth	52
Kirkwood v. Webster	227	Mackley v. Chillingworth	182, 217, 218
Kirton v. Braithwaite	222	Maclaren v. Home	217
Knight v. Gravesend R. Co.	182, 207	Madison v. Bacon	195, 208
Kynaston v. Mackinder	5	Maile v. Mann	252
		Malcolm v. Fullarton	61
		" v. Hodgkinson	77, 81, 82
L.		Malden v. Fyson	256
La Compagnie du Pacifique v. The Guano Co.	addenda	Manley v. Mayne	82
Laffitte & Co., In re	218	Mann v. Buckerfield	93
Lambert v. Cooper	245	" v. Harbord	132, 209
Langley v. Headland	231	Mapleson v. Masini	75
" v. Sugden	addenda	Mara v. Quin	36
Langridge v. Campbell	11, 12, 52, 62, 63, 64,	Marcus v. Gen. St. Nav. Co. 7, 181, 227	
Laing v. Bowes	218	Maria v. Hall	71
Lancashire &c. R. Co. v. Gidlow	179	Marsack & Webber, In re	57
Larssen v. Monmouthshire R. and Canal Co.	78	Marsden v. Lancashire and York- shire R. Co.	6
Lauretta, The	159	Marshall v. Willder	35, 36
Law v. Budd	addenda	" v. Yorkshire R. Co.	24
Lawrie v. Wilson	210	Martindale v. Falkner	242
Le Grange v. M'Andrew	90	Martineau v. Barnes	200
Le Grew v. Cooke	67	Mason v. Aird	80
Leach v. Lamb	155	" v. Polhill	78, 81, 90
Leaver v. Whalley	195	Masterman v. Malin	231
Lecocq v. S. E. R. Co.	209	Masters v. Lowther	251
Lee Conservancy v. Button	227	Matchett v. Parkes	190
Lees v. Reffit	230	Matthews v. Livesey	135
" v. Smith	84	Matlock Gaslight Co. v. Peters	52
Legge v. Tucker	24	Massey v. Allen	90
Leggo v. Young	19, 51	May v. Selby	218
Lennard v. Robinson	191	" v. Tarn	199, 228
Levett v. Rothwell	182	Mayberry v. Mansfield	252
Levy v. Drew	129, 230	M'Alpine v. Poles	140
Lewis, In re	239	M'Connell v. Johnston	75
" v. Holding	246	McGregor v. Keiley	235
" v. Nicholson	191	Melhuish v. Collier	36
" v. Woolrych	184	Mellin v. Dumont	85
Limerick & Waterford R. Co. v. Fraser	75	Melville v. Leeson	230
Lipscombe v. Turner	188	" v. Smark	244
Lloyd v. Davis	71	Mendelssohn v. Hoppe	addenda
Lockstone v. L. B. & S. C. R. Co.	206	Mercer v. Graves	232
Loneragan v. Royal Exchange Assurance	220	Metropolitan Asylum District v. Hill	5, 6, 7, 227
London & Birmingham R. Co., In re	227	Miles v. Harris	251
Lopez v. De Tastet	221, 222	Miller v. Thomson	215
		Milner v. Graham	165
		Minchin v. Hart	82
		Mitchell v. Darley Main Colliery Co.	7, 153

Table of Cases.

xvii

	PAGE
Mobbs v. Vandenbrande	47
Molling v. Buckholtz	102
Moody v. Spencer	232
„ v. Stewart	32
Moor v. Adam	217
Moore v. Watson	23, 52
Morgan v. Elford	161
„ v. Evans	78
„ v. Fernyhough	146
„ v. Greatrex	<i>addenda</i>
„ v. Miller	156
Morris v. Hunt	157, 208
„ v. Parkinson	190, 191, 237
Morrison v. Harmer	155, 215
„ v. Summers	222
Mortimore v. Cragg	251
Morton v. Palmer	162
Mount v. Larkins	220
Mummery v. Campbell	150
Murdoch v. Taylor	245
Myers v. Defries (4 Ex. D.)	2, 3, 5, 11
„ „ (5 Ex. D.)	2, 12, 13, 15, 16, 19, 163

N.

Nanny v. Kenrick	166
Nash v. Allen	253
„ v. Dickenson	251
„ v. Pease	247
Naylor v. Joseph	71
Neale v. Clarke 14, 16, 19, 26, 28, 30, 33, 53	
Nelson v. Ogle	74
„ v. Slack	190
„ v. Wilson	231, 232
Newbiggin-by-the-Sea Gas Co. v. Armstrong	191
Newington v. Levy	101
Newman v. Merriman	252
Newton v. Boodle	150
„ v. Chaplin	146
„ v. London, Brighton & S. C. R.	36
Nichols v. Bozon	107
„ v. Williams	190
Nicholson v. Dyson	163, 214
Nolan v. Copeman	217
Norfolk (Duke of) v. Arbuthnot	177
Norman v. Climensson	210
Norris v. Beazley	124
Nugent (Lord) v. Harcourt	72
Nylander v. Barnes	74

O.

O'Connor v. Murphy	231
O'Hara v. Reeves	44
O'Lawler v. Macdonald	72

	PAGE
Oliva v. Johnson	71
Oppenshaw v. Whitehead	200
Orme v. Crockford	155
Ormerod v. Tate	231
Orr v. Bowles	75
Orr-Ewing v. Johnston & Co.	227
Osborne v. Homburg	26
Owens v. Woosman	79, 80
Oxenden v. Cropper	90
Oxford & C. R. Co. v. Scudamore	134
Oxfordshire, In re Sheriff of,	246

P.

Paddock v. Forrester	215
Painter v. Linsell	241
Paraire v. Loibl	58
Parker v. G. W. R. Co.	78
„ v. Linnett	244
Parkinson v. Atkinson	195, 219
Parr v. Lillicrap	26, 61
Parsloe v. Foy	195
Parsons v. Tinling	9, 21
Paterson v. Harris	164
„ v. Johnson	99
„ v. Powell	99, 186
Pearse v. Coaker	45
Pell v. Linnell	145
Pellas v. Breslauer	22, 32
Penley v. Watts	257
Penson v. Lee	165
Perkins v. Adcock	77, 78
Perry v. Patchett	116
Philby v. Hazle	242
Philips v. Philips	158, 162, 176
Philpott v. Lehain	249
Phipps v. Daubney	235
Pickard v. G. W. R. Co.	153
Pierce v. Williams	257
Pigot v. Cadman	242
Pilgrim v. Hirschfeld	242
„ v. Southampton R. Co. 164, 199, 214, 219	
Place v. Campbell	72
Platt v. Greene	219
Plowden v. Campbell	72
Poensgen v. Chanter	99
Polini v. Gray	160, 161
Pontifex v. Midland R. Co.	24, 25
Poole v. Grantham	102
Pope v. Fleming	148
„ v. Mann	174
Postle v. Beckington	65
Potter v. Chambers 14, 16, 28, 33, 53	
„ v. Rankin (L.R. 4 C.P. 76) 195, 209	
„ v. Rankin (L.R. 5 C.P. 518), 182, 220	

	PAGE		PAGE
Pow v. Davis	257	Roe v. Hammond	251
Pratt v. Delarue	43	„ d. Wood v. Doe	51
Pray v. Edie	70	Rogers v. Banger	71
Presidder v. Smith	241	Rolph v. Crouch	258
Previte v. Adelaide Fire & Marine Ins. Co.	104	Ronneberg v. The Falkland Islands Co.	257, 258
Prew v. Squire	93	Ross v. Jaques	78
Price, In re	189	Rourke v. White Moss Colliery Co. .	160
Prince v. Samo	139, 151	Rowlands v. Samuel	257
Pringle v. Gloag	231	Royle v. Busby	252
Prudhomme v. Fraser	164	Rumelow v. Whalley . 12, 62, 65,	106
Pugh v. Kerr	129, 148, 149	Rutter v. Chapman	134
Punter v. Lord Grantley	186		
		S.	
Q.		Saltash, Mayor of v. Goodman . .	160
Quarrington v. Arthur	107	Sampson v. Mackay	32
Quartz Hill Gold Mining Co. v. Eyre	256, 257	„ v. Seaton R. Co.	248
Queen v. Mayor of Exeter	38	Sandys v. Louis	231
		Sargant v. Gannon	242
R.		Scales v. Sargeson	246
Radcliffe v. Hall	216, 217	Scarth v. Rutland	242
Raeburn v. Andrews	73, 76	Schoole v. Noble	230
Randall v. Moon	117	Schröder v. Cleugh	179
Randell v. Tremen	258	Scott v. De Richebourg	230
Rawstone v. Wilkinston	251	Scrace v. Whittington	241
Redondo v. Chaytor	71, 72, 73, 74	Seal v. Hudson	252
Redway v. Webber	166	Seaman, Ex parte	233
Rees v. Williams	240	Searle & Co. v. Matthews	244
Reg. v. Bayley	80	Selby v. Crutchley	85
„ v. Johnson	167	Sellman v. Boorn	180
„ v. Southampton Harbour Commissioners	90	Serrell v. Derbyshire R. Co.	155
Reid v. Ashley	12	Severance v. Civil Service Supply Association	41, 84
Rennie v. Mills	182	Seymour v. Corporation of Brecon .	248
Republic of Costa Rica v. Erlanger „ of Peru v. Weguelin	90 137	Sharland v. Loaring	22, 163
Rex v. Day	89	Sharp v. Ashby	208
„ v. Patteson	89	„ v. Lush	132
„ v. Robinson	251	Sharpe v. Lamb	134
Reynolds v. Harris	52, 164	Shaw, In re	237
„ v. Howell	191	Sheriff v. Gresley	175
Rice v. Brown	43	Shippey v. Grey	233
Richardson v. Chasen	258	Short v. Kalloway	257
„ v. Williamson	258	Showler v. Stoakes	167
Ridgway v. Jones	76, 77, 86	Siddons v. Lawrence	2, 3, 5, 11
Ridley v. Sutton	139, 140	Simpson v. Lamb	232
Rigby v. Okell	52	„ v. Stone	117
Rippon v. Joyce	80, 182	Sinclair v. Eldred	256
Rivers v. Hatton	104, 207	„ v. G. E. R. Co.	208, 209
Robbins v. Fennell	241	„ v. Sinclair	36
Roberts v. Brown	155	Singer Manufacturing Co. v. Loog .	228
„ v. Lucas	235	Skelton v. Stewart	217
Robertson v. Sterne	61	Skene v. Davis	87
Robinson, In re	238	Skinner v. Shoppee	163
		Slater v. Haines	251
		„ v. Mayor of Sunderland	232
		Slaughter v. Talbot	36
		Sleeman v. Copper Miners of Eng- land	148

Table of Cases.

xix

	PAGE
Small <i>v.</i> Batho	218
Smith, <i>In re</i>	189
Smith <i>v.</i> Badcock	108
„ <i>v.</i> Baker	181
„ <i>v.</i> Bird	134
„ <i>v.</i> Buller	218
„ <i>v.</i> Compton	257
„ <i>v.</i> Dimes	241
„ <i>v.</i> Edge	23
„ <i>v.</i> Earl of Effingham	208
„ <i>v.</i> G. W. R. Co.	151
„ <i>v.</i> Howell	257
„ <i>v.</i> London & St. Katherine docks Co.	156, 182
„ <i>v.</i> Marshall	148
„ <i>v.</i> Reed	<i>addenda</i>
„ <i>v.</i> Tateham	36
„ <i>v.</i> Taylor	241
Sneesby <i>v.</i> Lanc. & Yorksh. R. Co.	94
Snell, <i>In re</i>	189
Snow <i>v.</i> Townsend	78, 81
Sollery <i>v.</i> Flewker	195, 216
Souter <i>v.</i> Watts	190
Southee <i>v.</i> Terry	150
Sparenburgh <i>v.</i> Bannatyne	71
Sparrow <i>v.</i> Hill	164
„ <i>v.</i> Turner	146
Speeding <i>v.</i> Young	151, 215
Spencer <i>v.</i> Barrough	134
„ <i>v.</i> Hamerton	163, 165
St. Leger <i>v.</i> Nuovo	71
St. Losky <i>v.</i> Green	129
St. Olaf, The	102
Staley <i>v.</i> Bedwell	246
Staniland <i>v.</i> Ludlow	214
Stanton <i>v.</i> Collier	82
Staples <i>v.</i> Young	14, 15, 16, 31
Starling <i>v.</i> Cozens	166
Stead <i>v.</i> Williams	78, 81
Steel <i>v.</i> Allan	84
Stevens <i>v.</i> Chapman	52
Stevenson <i>v.</i> Blakelock	232
Stewart <i>v.</i> Steele	208, 221
Stilwell <i>v.</i> Ruck	138
Stodhart <i>v.</i> Johnson	65, 167
Stokes <i>v.</i> Woodeson	103
Stooke <i>v.</i> Taylor	14, 19, 31, 33, 54, 55, 56
Strachey <i>v.</i> Lord Osborne	31, 182
Sullivan <i>v.</i> Pearson	231
Sully <i>v.</i> Noble	145
Sunderland Local Marine Board <i>v.</i> Frankland	247
Sutton, <i>In re</i>	238 & <i>addenda</i>
Swaine <i>v.</i> Spencer	246
Swansea Shipping Co. <i>v.</i> Duncan	124
Swinbourne <i>v.</i> Carter	76
Sykes <i>v.</i> Sykes	76, 77, 78, 79, 80
Symonds <i>v.</i> Page	111

T.

	PAGE
Tambisco <i>v.</i> Pacifico	71, 73
Tanner <i>v.</i> Christian	191
„ <i>v.</i> Lea	185
Tapp <i>v.</i> Jones	247
Taylor <i>v.</i> Cass	32
„ <i>v.</i> Fraser	70
„ <i>v.</i> Hailstone	258
„ <i>v.</i> Hodgson	235
„ <i>v.</i> Montague	78, 81
„ <i>v.</i> Rolfe	102
Tempany <i>v.</i> Rigby	43
Temperley <i>v.</i> Scott	221
Tenant <i>v.</i> Ellis	23
Thelluson <i>v.</i> Staples	217
Thompson, <i>Ex parte</i>	233
Thornel <i>v.</i> Roelants	75
Threlfall <i>v.</i> Wilson	41, 84
Thrustout d. Barnes <i>v.</i> Crafter	231
Tichborne <i>v.</i> Mostyn	47, 87
Tidwell <i>v.</i> Ariel	4
Tillett <i>v.</i> Stracey	206
Tindall <i>v.</i> Bell	257
Tomlinson <i>v.</i> Bollard	148
Tonge <i>v.</i> Chadwick	27
Traherne <i>v.</i> Gardner	164
Tremain <i>v.</i> Barrett	221
„ <i>v.</i> Faith	221
Trent <i>v.</i> Harrison	221
Tullock <i>v.</i> Crowley	72
Turnbull <i>v.</i> Janson	182, 197, 210, 214, 217, 218
Turner <i>v.</i> Berry	26, 30
„ <i>v.</i> Heyland	5
„ <i>v.</i> Izon	94
Twigg <i>v.</i> Potts	165
Tyne Alkali Co. <i>v.</i> Lawson	5

U.

United Ports Insurance Co. <i>v.</i> Hill	77, 78
Usil <i>v.</i> Brearley	160

V.

Vale <i>v.</i> Oppert	161
Vallance <i>v.</i> Evans	167
Vane <i>v.</i> Whittington	134
Vaughan <i>v.</i> Barnes	61
Vickary <i>v.</i> G. N. R. Co.	137
Vickery <i>v.</i> London, Brighton & S. C. R. Co.	157
Vines <i>v.</i> London, Brighton & S. C. R. Co.	157, 210

Table of Cases.

	PAGE		PAGE
W.		Whicher, In <i>re</i>	238
Wade <i>v.</i> Malpas	57	White <i>v.</i> Brett	223
Waggett <i>v.</i> Shaw	155	„ <i>v.</i> Royal Ex. Ass. Co.	232
Wainwright <i>v.</i> Bland	89	Whitehouse <i>v.</i> Penn	218
Wakefield <i>v.</i> Brown	181, 207	Whitmore <i>v.</i> Williams	102
Walbank <i>v.</i> Quarterman	252	Whittall <i>v.</i> Campbell	72
Walesby <i>v.</i> Goulstone	27	Wilkes <i>v.</i> Hopkins	134
Walker <i>v.</i> Brown	52	Wilkinshaw <i>v.</i> Marshall	81
„ <i>v.</i> Hatton	257	Wilkinson <i>v.</i> Allot	105, 106, 214
Wall <i>v.</i> Lyon	129	„ <i>v.</i> Smart	242
Waller <i>v.</i> Blacklock	151	Williams <i>v.</i> Burrell	258
„ <i>v.</i> Holmes	232	„ <i>v.</i> Crossling	85
„ <i>v.</i> Lacey	242	„ <i>v.</i> Gray	85
Walsh <i>v.</i> Smith	79	„ <i>v.</i> S. E. R. Co.	124
Walters <i>v.</i> Howells	155	„ <i>v.</i> Sharwood	107
Ward <i>v.</i> Bell	184	„ <i>v.</i> Vines	94
„ <i>v.</i> Hepple	232	Willis <i>v.</i> Garbutt	71
Warne <i>v.</i> Hill	148	„ <i>v.</i> Peckham	217
Waters <i>v.</i> Howells	155	Wilson <i>v.</i> Foote	167
„ <i>v.</i> Wetherby	146	„ <i>v.</i> Ford	258
Watson <i>v.</i> Boyes	165	„ <i>v.</i> River Dun Co.	214
„ <i>v.</i> Coleman	118	Wimshurst <i>v.</i> Barrow Ship Build- ing Co.	19, 51
„ <i>v.</i> Fraser	84	Winter <i>v.</i> Payne	241
„ <i>v.</i> G. W. R. Co.	227	Winterfield <i>v.</i> Bradnum	15, 74, 75
„ <i>v.</i> Maskell	232	Wintle <i>v.</i> Williams	246, 248
„ <i>v.</i> Rodwell	238	Wise <i>v.</i> Birkenshaw	248
Weald <i>v.</i> Brown	111	Witham <i>v.</i> Vane	126
Webb <i>v.</i> Mansell	159	Witt <i>v.</i> Corcoran	4
„ <i>v.</i> Stenton	247, 248	Wollen <i>v.</i> Smith	101
„ <i>v.</i> Ward	78	Wood <i>v.</i> O'Kelly	52
Webber <i>v.</i> London, Brighton & S. C. R. Co.	161	Woodhams <i>v.</i> Newman	27
„ <i>v.</i> Nicholas	231	Woosnam <i>v.</i> Wood	185
Webster, <i>Ex parte</i>	227	Wray <i>v.</i> Brown	78, 81
„ <i>v.</i> Delafield	85	Wright <i>v.</i> Burroughes	44
„ <i>v.</i> Emery	62	Wyllie <i>v.</i> Phillips	117
Weeks <i>v.</i> Propert	258		
Wegmann <i>v.</i> Corcoran	211	Y.	
Welch <i>v.</i> Hole	231	Yarworth <i>v.</i> Mitchell	84
„ <i>v.</i> Vickery	174	Yglesias <i>v.</i> Royal Exchange Ass. Corporation	209
Wells <i>v.</i> Barton	72	Yorkshire Banking Co. <i>v.</i> Beatson	120
„ <i>v.</i> Mitcham Gaslight Co. 184, 189, 228		Yorkshire Waggon Co. <i>v.</i> New- port Coal Co.	124, 126
Wemyss <i>v.</i> Greenwood	155	Youde <i>v.</i> Youde	76
Westenberg <i>v.</i> Mortimer	72	Young <i>v.</i> Crompton	118
Western of Canada Oil Lands Co. <i>v.</i> Walker	90	„ <i>v.</i> Gye	52
Westminster, Silver Lead Ore Co. <i>In re</i> Duches of	227	„ <i>v.</i> Möller	158
Whaley <i>v.</i> Laing	57	„ <i>v.</i> Rishworth	89
Wheldal <i>v.</i> Northern R. Co.	177		

TABLE OF STATUTES.

—0—

	PAGE		PAGE
52 Hen. iii. c. 6 (St. Marleberge).	1	1 & 2 Vict. c. 110. s. 11 . . .	253
6 Edw. i. c. 1 (St. Gloster)	1	2 & 3 Vict. c. 71. s. 53 . . .	49, 69
3 Hen. vii. c. 10	1	c. 93	49, 69
11 Hen. vii. c. 12	42	3 & 4 Vict. c. 24. s. 2 . . .	2, 21, 22
19 Hen. vii. c. 20	1	c. 88	49
7 Hen. viii. c. 19	1	5 & 6 Vict. c. 97. ss. 1, 2 . .	213, 252
23 Hen. viii. c. 15. s. 1 . . .	1, 42, 105	c. 109. s. 15 . . .	49, 68
s. 2	43	6 & 7 Vict. c. 73. s. 37 . . .	235, 238, 242
24 Hen. viii. c. 8	2	ss. 38, 40 to 43 . . .	238
8 Eliz. c. 2. s. 2	105, 107	c. 96	66
13 Eliz. c. 2	2	8 Vict. c. 20. s. 139	69
18 Eliz. c. 5. s. 3	106	8 & 9 Vict. c. 11	2
29 Eliz. c. 4	251	c. 93	67, 69
43 Eliz. c. 6. s. 2	2, 21	c. 100. s. 105 . . .	213
4 Jac. i. c. 3	105, 106	9 & 10 Vict. c. 95. s. 58 . .	20, 21
21 Jac. i. c. 16. s. 6	2, 21	s. 91	291, 292
13 Car. ii. st. 2. c. 2. s. 3 . .	2	10 & 11 Vict. c. 24. s. 209 . .	49
22 & 23 Car. ii. c. 9	21	11 & 12 Vict. c. 44. s. 7 . . .	49
8 & 9 Will. iii. c. 11	58, 111	ss. 8, 9	48
4 & 5 Anne, c. 16. s. 13 . . .	117	s. 11	49, 68
7 Anne, c. 6. s. 12	73	ss. 13, 14	49
3 Geo. i. c. 15. ss. 15, 16 . . .	253	12 & 13 Vict. c. 92. s. 27 . . .	49
2 Geo. ii. c. 23. s. 23	183	c. 106	2
7 Geo. ii. c. 20. s. 1	117	13 & 14 Vict. c. 61. s. 1 . . .	20, 21
6 Geo. iv. c. 50. s. 34	155	s. 11	61
s. 35	156	s. 19	49
10 Geo. iv. c. 44. s. 4	49, 69	14 & 15 Vict. c. 99. s. 6 . . .	137
ss. 41, 44	69	15 & 16 Vict. c. 76 (C.L.P. Act,	
1 Will. iv. c. 22. s. 4	139	1852)	2
s. 9	139, 140	s. 8	116, 183
1 & 2 Will. iv. c. 41. s. 19 . .	49, 68, 69	s. 33	110
c. 58. s. 6	246	s. 73	62
3 & 4 Will. iv. c. 42	2	s. 41	2, 44
s. 16	112	s. 81	13
s. 31	76	s. 117	133
ss. 32, 33	107	s. 123	22
s. 35	106	s. 142	82
c. 43	2	ss. 168 to 221 . . .	47
5 & 6 Will. iv. c. 50 (Highway		s. 169	80
Act, 1835), s. 109	49, 69	s. 172	87
c. 76. s. 82	38	s. 177	45, 111
7 Will. iv. & 1 Vict. c. 20. s. 23 .	168	s. 187	46
c. 55	251, 253	s. 200	98
1 Vict. c. 30	168	s. 212	47

	PAGE		PAGE
15 & 16 Vict. c. 76. s. 213 . . .	87	31 & 32 Vict. c. 54 . . .	73,
s. 219 . . .	117	s. 6 . . .	
c. 83. s. 43 . . .	47	c. 71 . . .	
16 & 17 Vict. c. 73. s. 42 . . .	169	32 & 33 Vict. c. 62 (Debtors Act,	
c. 107. s. 316 . . .	69	1869) . . .	91, 149, 2
17 & 18 Vict. c. 102. s. 23 . . .	39	s. 6 . . .	1
17 & 18 Vict. c. 125 (C.L.P. Act,		c. 71 (Bankruptcy	
1854) s. 3 . . .	11, 50, 51	Act, 1869), s. 125 . . .	77,
s. 46 . . .	141	33 & 34 Vict. c. 28. s. 4 . . .	2
s. 50 . . .	137	ss. 5, 6, 8 . . .	2
ss. 53, 57 . . .	141	s. 9 . . .	2
s. 58 . . .	153	ss. 10, 16, 17, 18 . . .	2
s. 70 . . .	41	33 & 34 Vict. c. 77 . . .	1
s. 93 . . .	47, 87	c. 109. s. 6 . . .	
18 & 19 Vict. c. 120. s. 224 . . .	49	34 Vict. c. 2 s. 1 . . .	1
19 & 20 Vict. c. 69. s. 6 . . .	49, 69	36 & 37 Vict. c. 66 (Judicature	
c. 108 (County Courts		Act, 1873), s. 49 . . .	6, 7, 126, 1
Act, 1856), s. 24 . . .	27	ss. 56, 57, 58 . . .	
s. 26 . . .	18, 32	s. 67 . . .	9, 16, 20, 2
s. 27 . . .	20	28, 29,	
22 & 23 Vict. c. 66. s. 28 . . .	49	37 & 38 Vict. c. 68. s. 12 . . .	186, 2
23 & 24 Vict. c. 126 (C.L.P. Act,		38 & 39 Vict. c. 55 (Public Health	
1860), ss. 1, 2 . . .	47	Act, 1875), s. 264 . . .	37,
s. 23 . . .	65	c. 79 . . .	2
s. 24 . . .	66	40 & 41 Vict. c. 62. s. 2 . . .	2
23 & 24 Vict. c. 127. s. 28 . . .	233	42 & 43 Vict. c. 59 . . .	43, 105, 10
25 & 26 Vict. c. 89 (Companies'		107, 1	
Act, 1862), s. 69 . . .	78, 89	c. 78 . . .	1
c. 102. s. 106 . . .	49	s. 191 . . .	
27 & 28 Vict. c. 95. s. 2 . . .	67	45 & 46 Vict. c. 50 (Municipal Cor-	
30 & 31 Vict. c. 142 (County Courts		poration Act, 1882), s. 224 . . .	39,
Act), 1867 . . .	312	s. 226 . . .	38,
s. 5. 2, 14 (n) 17, 20,		c. 57, s. 4 . . .	20, 21,
21 to 33, 43,		c. 75 (Married	
54, 55, 62,		Women's Property Act, 1882),	
93, 114, 146,		s. 1 . . .	39,
165		s. 12 . . .	
s. 7 . . .	20, 26, 293	ss. 13, 15, 18, 23 . . .	
s. 8 . . .	20	46 & 47 Vict. c. 49. sched. . .	32, 82, 9
s. 10 . . .	20, 32, 66, 79,	183, 2	
89, 293		c. 52 (Bankruptcy	
s. 11 . . .	296	Act, 1883), s. 46 . . .	addn
s. 12 . . .	20, 296	s. 146 . . .	2

TABLE OF THE RULES OF THE SUPREME COURT, 1883.

—0—

	PAGE		PAGE
Order 2, r. 2	225	Order 20, r. 1	129, 229
Order 3, r. 6	45, 109, 183	r. 6	130
r. 7	45, 116, 118, 183	Order 21, r. 9	136
Order 4, r. 1	187	r. 13	224, 285
r. 2	187	r. 17	27 (<i>f</i>)
r. 3	187	r. 20	82
Order 5, r. 6	169	r. 21	47 (<i>g</i>)
Order 7, r. 3	241	Order 22, r. 1	58, 61, 64, 65, 67
Order 12, r. 25	87 (<i>a</i>)	r. 2	58
Order 13, r. 2	112 (<i>a</i>)	r. 3	58, 67
rr. 3, 4	109	r. 4	58
rr. 5, 6	110	r. 5	58, 64, 67
rr. 7, 8, 9	111	r. 6	59
r. 10	112	r. 7	60, 62, 64
r. 11	112 (<i>a</i>)	r. 8	65
Order 14, r. 1	45, 118, 119, 229, 262, 267	r. 9	65
rr. 2, 3, 4, 5	119	rr. 10 to 18	273
r. 6	83, 119	Order 24, rr. 1, 2	100
Order 16, rr. 1, 2, 3, 4	121	r. 3	100, 101
rr. 5, 6, 7, 11	122	Order 25, rr. 1, 2, 3, 4	92
r. 12	123	Order 26, r. 1	98, 101 (<i>f</i>), 102
r. 16	39, 84	r. 2	102 (<i>h</i>)
rr. 22, 23, 24, 25, 26, 27, 28, 29	42	r. 3	98, 102, 103
r. 31	43, 221 (<i>j</i>)	r. 4	99
r. 48	124	Order 27, r. 1	112
r. 49	125, 224, 285, 309	r. 2	46, 113
rr. 50, 51, 52	125	r. 3	113
rr. 53, 54, 55	126	r. 4	46, 113
Order 17, r. 1	82, 99 (<i>b</i>)	r. 5	46, 114
r. 2	82, 99, 123	r. 6	114
rr. 3, 4, 5, 6, 7, 8, 9	83	rr. 7, 8	46, 114
Order 18, rr. 1, 2, 3, 4, 5, 6	123	r. 9	46, 115
rr. 7, 8, 9	124	r. 10	115 (<i>a</i>)
Order 19, r. 2	225	rr. 11, 12, 15	115
r. 3	27	Order 28, rr. 1, 2, 3, 4, 5	127
r. 5	225	r. 6	128
r. 7	130	r. 7	129
r. 21	225	rr. 11, 12	128
r. 27	128, 130 (<i>a</i>)	r. 13	127
		Order 30, rr. 1, 2	130
		r. 3	131
		Order 31, r. 1	136

	PAGE		PAGE
Order 31, r. 3	137, 235	Order 54, r. 5	131
r. 7	225	r. 6	131, 170 (a)
r. 8	267	r. 7	132, 170 (a)
r. 11	137	r. 12	173, 180, 197
r. 14	286	Order 57, r. 8	244
r. 15	134 (a), 137, 138, 204 (a)	r. 13	244, 245
r. 25	138, 150	r. 15	244
r. 26	138, 267	Order 58, rr. 4, 6	158
r. 27	139, 276	rr. 7, 8, 12, 15, 19	159
Order 32, r. 2	133, 134, 135	Order 61, r. 3	169
r. 4	136, 212	r. 29	217
r. 7	133	Order 64, r. 6	91
r. 8	134	r. 8	131
r. 9	134, 226	r. 11	174 (b)
Order 34, rr. 1, 2, 3	95	r. 14	57
rr. 4, 5, 6, 7	96	Order 65, r. 1	2, 3, 4, 5, 6, 9, 18, 62, 65, 106, 114, 163
r. 9	96	r. 2	16, 92, 102 (e), 163
rr. 10, 11, 12	97	r. 3	149, 186
Order 35, r. 4	173	r. 4	18, 32
Order 36, r. 7 (a)	155	r. 5	196
r. 10	51 (a)	r. 6	88, 89
r. 19	145, 146, 148	r. 7	91, 161
r. 30	135	r. 8	177
rr. 31, 32	145	r. 9	177, 178 (a)
r. 33	146	r. 10	178, 241
r. 34	145, 146	r. 11	170, 190, 191
r. 40	210 (d)	r. 12	31, 208, & addenda
r. 56	147	r. 13	addenda
Order 37, r. 4	202	r. 14	186, 230, 231 (g)
r. 5	140	r. 15	57
r. 6	141 (a)	r. 16	174, 176
rr. 7, 9, 13, 14, 15	141	r. 17	175
Order 38, rr. 2, 3	192, 226	r. 19	169, 238 (i)
rr. 7, 11	192	r. 22	addenda
r. 15	193	r. 23	128, 148, 184
r. 28	194	r. 27, reg. I	184 (c), 193, 212
Order 39, rr. 1, 3, 5	142	2	193, 212
Order 41, rr. 7, 8	301	3	184 (c), 200, 212, 222
Order 42, r. 15	250, 253	4	184 (c), 193, 212
r. 16	253	5	193
r. 17	249	6	185
r. 18	46 (e), 249, 255	7	185, 224
r. 19	46 (e), 250	8	185
r. 22	250	9	197 (b), 198, 214, 217
r. 23	36, 250	10	222
r. 24	239 (a), 249	12	196
r. 30	41	13	197
rr. 32, 33, 34	255	14	199
Order 43, rr. 1, 2	253	15	184 (c), 206, 212
rr. 4, 5, 6	254	16	207
r. 7	249, 254	17	138, 184 (c)
Order 45, rr. 1, 2, 3	247	18	138
rr. 4, 5, 6, 7, 8	248		
r. 9	246		
Order 47, r. 3	46, 118		
Order 50, rr. 3, 5, 6	153		
r. 8	83		
Order 53, rr. 1, 3, 4	41		

Rules of the Supreme Court, 1883.

xxv

	PAGE		PAGE
Order 65, r. 27, reg. 20	. 171, 226	Order 65, r. 27, reg. 43	. . 178
21	. 131, 172	44	. . 208
	213 (a), 226	45	. . 207
23	. . 132	46	. . 208
24	131, 184 (c),	47	. . 208
	212. 213	48	. . 210
25	168, 175 (b)	49	. . 197
26	. . 169	50	. . 146
27	. . 169	51	. . 211
28	. . 175	52	. . 211
29	. 185, 229	53	. 193, 204
30	. . 229	54	. 139, 204
31	128, 130 (a),	55	. . 172
	149	56	. . 169
32	. . 128	57	172, 175 (d),
33	. 143, 172		176 (a)
34	. . 172	58	. . 243
35	. . 169	Order 66, r. 3	. . 203 (a)
36	. 172, 227	r. 5	. . 193
37	. . 178	r. 7	. 193, 194, 203, 204
38	. 118, 181,	Order 67, rr. 2, 3	. . 174 (c)
	207, 211	Order 69, r. 2	. . <i>addenda</i>
39	. 179, 180	rr. 3, 4	. . 91
40	. 179, 180	r. 5	. . 91, 149
41	. 178 (d),	Order 70, r. 2	. . 132
	179, 180	r. 4	. . 132, 150
42	178 (d), 179	Order 72, r. 2	. . 63 (b), 105, 147

TABLE OF REGULÆ GENERALES MADE UNDER THE COMMON LAW PROCEDURE ACTS.

—0—

	PAGE		PAGE
<i>Reg. Gen. Hil. Term, 1853</i>		<i>Reg. Gen. Hil. Term, 1853</i>	
r. 4	242	r. 122	43, 147
r. 12	63	r. 154	175
r. 23	98, 102	<i>Reg. Gen. Trin. Term, 1853</i>	
r. 24	117	r. 22	101
r. 30	134	r. 23	101
r. 39	147	r. 28	43
r. 44	155	r. 29	46, 106
r. 46	156	<i>Reg. Gen. Hil. Term, 1862</i>	95
r. 48	154	<i>Reg. Gen. Trin. Term, 1864</i>	305
r. 49	154	<i>Reg. Gen. Mich. Term, 1867</i>	180
r. 59	174	<i>Directions to Masters.—Hil. Term,</i>	
r. 60	175	1853	168, 199, 216, 217, 299
r. 114	46	<i>Directions to Masters. — Trin.</i>	
		Term, 1870	210

ADDENDA ET CORRIGENDA.

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NOTE.—The whole of the C. L. Proc. Act, 1852 (15 & 16 Vict. c. 76), except sections 23, 104 to 108, 110, 112 to 115, 126, 127, 132, 208 to 220, 226, 235, 236 :—
The whole of the C. L. P. Act, 1854 (17 & 18 Vict. c. 125), except sections 3 to 17, 20 to 30, 59, 87, 89, 103, 106, 107, and—
The whole of the C. L. P. Act, 1860 (23 & 24 Vict. c. 126), except sections 1, 17, 22, 45 and 46 :
are repealed by the recent statute 46 & 47 Vict. c. 49. Sched.

Add p. 7, note (e)—

The Court of Appeal have reversed the decision of *In re Bradford*, upon the ground that on a question of misconduct or no misconduct by a solicitor there must be an appeal, in order that he may have an opportunity of showing that the circumstances were such as to bring the case within the discretionary jurisdiction of the Judge at chambers—32 *W. R.* 238. 53 *L. J. Q. B.* 65.

Add p. 7, l. 11 from bottom ; and p. 245, l. 3 from bottom—

A master when making an order barring a claimant, has no power under Order 57, r. 15, to make it a term of the order that the plaintiff shall pay the costs of the original action, apart from the interpleader proceedings. An appeal lies from such an order notwithstanding 36 & 37 Vict. c. 66, s. 49—*Hansen v. Maddox*. 12 Q. B. D. 100. 52 *L. J. Q. B.* 67.

Add p. 18, line 17, and p. 32, line 12—

An action brought by an executor for £20, being money lent by the testator to the defendant, was remitted for trial to the County Court under 19 & 20 Vict. c. 108 s. 26. The trial took place before October 24, but judgment was given for the plaintiff for £10 after that date, the County Court Judge declining to certify that there was sufficient reason for bringing the action in the Superior Court. The officer having refused to allow the plaintiff to sign judgment for his costs, *Field J.* at chambers held that the plaintiff having sued in the High Court under a fair and reasonable expectation that he could obtain judgment under Order 14, was entitled to such costs as were allowable under Order 65, r. 4, and was not deprived of them under the provisions of 30 & 31 Vict. c. 142, s. 5, *Evans v. Edwards*. The *Law Journal*, 1883, p. 633 : *W. N.*, 1883, p. 194.

Order 65, r. 12, does not apply to all actions founded on contract in which the plaintiff recovers less than £50. Where, therefore, a plaintiff obtained judgment by default for a sum less than £20, in an action founded on contract it was held by *Mathew J.* that sect. 5 of the County Courts Act, 1867, was applicable, and that in the absence of special grounds for allowing costs, he was not entitled to any costs—*Calvert v. Davison*. The *Law Journal*, Jan. 26, 1884, p. 74 : *W. N.*, 1884, p. 18.

Add p. 31, l. 19—

Where an action was referred at the trial, costs to be in the discretion of the arbitrator, who made his award upon Nov. 15, and the plaintiff subsequently signed judgment for £30 and his costs, it was held by *Field J.* at chambers that as the right to costs depends upon the judgment, which was signed after the Rules of Court came into operation, the provisions of Order 65, r. 12, applied to the case, and the plaintiff having recovered less than £50, was entitled to no more

costs than he would have been entitled to had he brought the action in the County Court—*Langley v. Sugden*. The *Law Journal*, Dec. 1, 1883, p. 651 : *Weekly Notes*, Dec. 1, 1883, p. 198.

Add p. 36, l. 2 from bottom—

As to the party to bear costs where the Court or a Judge appoints one of the solicitors of the court to be guardian *ad litem* of an infant or of a person of unsound mind, see Order 65, r. 13.

Page 49, l. 15 from bottom—

for 5 & 6 Will. 4, c. 60, read 5 & 6 Will. 4, c. 50.

Page 63, l. 3—

for 1855, read 1853.

Add p. 63, l. 17—

Where in an action the defendants denied all the allegations of the statement of claim, and as an alternative defence paid money into Court in satisfaction of the plaintiffs' claim, but the plaintiffs did not accept the sum paid in, the cause was referred—costs of the cause, reference, and award to abide the event—the arbitrator found all the issues except one as to special damage in favour of the plaintiffs, and also found that the money paid in was enough to satisfy the plaintiffs' claim in respect of the subject matter of the action. The Court of Appeal held that the defendants were entitled to the general costs of the action and award, and to the costs of the issues found in their favour; but that the plaintiffs were entitled to the costs of the issues upon which they had succeeded. The costs in such a case ought to be taxed in the usual manner as though the action had been tried out in the ordinary course of law—*Goutard v. Carr*.—32 *W. R.*, 242. 53 *L. J. Q. B.* 55.

Add p. 83, l. 9—

An application by the defendant for delivery up of mortgage deeds upon payment of amount of lien claimed into Court under Order 50, r. 8, in an action by mortgagee against mortgagor, on a covenant in the mortgage deed for payment of principal and interest, was refused by *Bull J.* at chambers. It appeared that the defendant paid into Court the full amount claimed and the plaintiff took it out in satisfaction of his claim; there was no counterclaim nor did the facts stated in the affidavits shew any ground for a counterclaim, until after the money paid into Court had been accepted in satisfaction—*Morgan v. Greatrex*. The *Law Journal*, Jan. 5, 1884, p. 6 : *W. N.*, 1884, p. 2.

Add p. 109—

A plaintiff is entitled to an order for costs as of an action in the High Court under Order 65, r. 12, when the writ in an action of contract is served out of the jurisdiction and judgment is signed in default of appearance for a sum less than £50; for the plaintiff could not have brought the action in the County Court effectively as he could not get leave to serve the writ out of the jurisdiction—*Mendelssohn v. Hoppe*. The *Law Journal*, Feb. 9, 1884, p. 108 : *W. N.*, 1884, p. 31.

Page 117, l. 11 from bottom—

for *recover* read *reconvey*.

Add p. 118, l. 24, and p. 208, l. 13—

The following sums have been fixed by *Field J.* at chambers, as the costs payable where judgment has been obtained under Order 14, for sums between £50 and £20 in actions of contract :—

	£	s.	d.
In town cases	6	10	0
In country cases	7	0	0

An extra six shillings will be allowed for each additional defendant, and any extraordinary costs that have been incurred in any particular case may be brought to the notice of the master and added to the usual allowance—*Bye v. Kirby*. The *Law Journal*, Nov. 24, 1883, p. 634 : *Weekly Notes*, Dec. 11, 1883, p. 195.

Where a writ has been issued in London and served upon a defendant in the country, that is a country case, and a plaintiff who has obtained judgment under Order 14, is entitled to £7 costs instead of £6 10s.—*Davies v. Stevens*.—The *Law Journal*, Jan. 19, 1884, p. 49 : *W. N.*, 1884, p. 9.

Add p. 139, l. 11—

A judge is not bound to make an order dispensing with the deposit required by Order 31, rr. 25, 26, before delivery of interrogatories, merely on the ground that the parties have assented to such an order being made—*Aste & Co. v. Stumore & Co.* 32 *W. R.* 219. This case affirms the remarks of *Field J.* in *Hall v. Liardet*. See *post* p. 139.

The deposit paid into Court under Order 31, rr. 26, 27, is not paid in as security for the costs of discovery only, but is security for the general costs of the action—*Jubb v. Bibbs*. The *Law Journal*, Dec. 8, 1883, p. 655 : *W. N.*, Dec. 8, 1883, p. 208.

A deposit for discovery was required from a foreign corporation in *La Compagnie &c. du Pacifique v. The Guano Co.*—The *Law Journal*, Nov. 10, 1883, p. 609 : *W. N.*, Nov. 10, 1883, p. 166.

The provisions of Order 31, rr. 25, 26, do not apply to an order for discovery of ship's papers.—*Law v. Budd*. The *Law Journal*, Nov. 10, 1883, p. 608 : *W. N.*, Nov. 10, 1883, p. 166.

Add p. 139, l. 11—

In *Burr v. Hubbard*, the deposit required under Order 31, rr. 25, 26, when interrogatories are delivered, was dispensed with by *Field J.* The action was to recover damages for personal injury to the plaintiff. The defendant denied his liability on the ground that the persons who caused the injury were not in his employment at the time, and the plaintiff desired to interrogate the defendant as to this. The plaintiff, moreover, stated in his affidavit that by reason of his poverty he was unable to make the deposit of £5, pursuant to the Rules of Court.—See The *Law Journal*, Dec. 1, 1883, p. 650 : *Weekly Notes*, Dec. 1, 1883, p. 193.

Add p. 139, l. 11—

An action was brought to recover damages for alleged fraud on the part of seven defendants as directors and secretary of a company. The defendants appeared and were represented by different solicitors. The plaintiff without leave (the action being for fraud) delivered interrogatories to each of the seven defendants, but only paid into Court a sum of £10 as security under Order 31, r. 26. *Field J.* at chambers held that under Order 31, rr. 25, 26, the plaintiff must make the prescribed deposit in respect of each set of interrogatories which he delivered—*Smith v. Reed*. The *Law Journal*, Dec. 1, 1883, p. 649 : *Weekly Notes*, Dec. 1, 1883, p. 196.

Page 171, *Add* after Order 65, r. 27 (20)—

In a case in which an application was made to stay proceedings upon payment of the sum claimed and costs, less certain costs alleged to be unnecessary, it appeared that sixteen actions had been brought against underwriters which had been consolidated by order. The defendants desired to pay as for a total loss, but objected to pay the costs of the sixteen writs. *Field J.* ordered that the plaintiffs should have the costs of one action, and that as to the other actions, they should pay to the defendants such costs, if any, as they had been put to by the bringing of the separate actions, in lieu of including all the defendants in one writ—*Gutret v. Young*. The *Law Journal*, Dec. 15, 1883, p. 683 : *Weekly Notes*, Dec. 15, 1883, p. 216.

Add p. 172, after Order 65, r. 27 (36)—

Where in pursuance of any direction by the Court or a Judge in Chambers drafts are settled by any of the Conveyancing Counsel of the Court, the expense of procuring such drafts to be previously or subsequently settled by other counsel, on behalf of the same parties on whose behalf such drafts are settled by the Conveyancing Counsel of the Court, shall not be allowed on taxation as between party and party, or as between solicitor and client, unless the Court or a Judge shall otherwise direct. Order 65, r. 22.

Page 179—

For precedents of forms in which objections to taxation are to be drawn, see Scott's "Costs," 842 (ed. 4), and Summerhays & Toogood's "Precedents of Costs," (ed. 4).

Page 202, l. 2—

The new order as to Court fees, 1884, fixes the fee of two shillings and sixpence alone, as payable for filing a warrant of attorney or cognovit, see *post*, p. 326.

Add p. 251—

The sheriff or other officer executing an order of arrest under the Debtor's Act, 1869, s. 6, is entitled to the same fees as heretofore—Order 69, r. 2.

Add p. 253—

By sect. 46 (2), of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding £20, the sheriff after deducting the costs of execution from the proceeds of the sale is to retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, he is to pay the balance to the trustee in bankruptcy who shall be entitled to retain the same as against the execution creditor, but otherwise he is to deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

The following scale of fees payable to "Examiners of the High Court" was published on Feb. 4, 1884.

FEES.

	£	s.	d.
1. For every examination before an examiner of the Court in London or Middlesex	1	1	0
2. For the examiner's clerk	0	2	6
3. For each hour or part of an hour occupied in such examination beyond two hours	0	10	6
4. For the examiner's clerk, where such examination occupies more than three hours (in addition to fee No. 2) per day	0	2	6
5. For every examination before an examiner of the Court elsewhere than in London or Middlesex	5	5	0
6. For every day of six hours, or part of a day occupied in such examination beyond the first day	5	5	0

The party prosecuting the order or his solicitor, shall also pay all reasonable travelling and other expenses, including charges for the room (other than the examiner's chambers) where the examination is taken.

N.B.—The fees Nos. 1, 2 & 5 (as the case may be), shall be paid by the party prosecuting the order or his solicitor on obtaining the examiner's note of time and place for the examination. The fees Nos. 3, 4 & 6 (as the case may be), shall be paid so soon as the examination has been concluded, together with any travelling or other expenses as above-mentioned.

COSTS

OF A

COMMON LAW ACTION.

CHAPTER I.

COSTS OF AN ACTION IN GENERAL.

THE right of a party, whether plaintiff or defendant, to recover costs incurred in an action is entirely the creature of statute. No such right existed at Common Law, and if a plaintiff failed in his action, he was amerced *pro falso clamore*; if he succeeded, the defendant was *in misericordia* for his unjust detention of the plaintiff's right, but he was not liable for the payment of any costs of suit, at least under that title. Costs, however, were always considered and included in the quantum of damages in such actions where damages are given.^a The first statute entitling a plaintiff to costs was 6 Edw. i. c. 1 (Statute of Gloucester), which gave costs to demandants who recovered damages in a real action, and subsequent statutes were passed at different times giving a plaintiff a right to recover costs in *any* action.^b The right of a defendant to recover costs was, with three exceptions,^c first conferred by 23 Hen. viii. c. 15, but the most important statute in favour of defendants was 4 Jac. i. c. 3, which gave costs to a defendant in every case where the plaintiff would have had costs if he had succeeded. Both these statutes, however, gave a defendant costs only in those cases where he had a verdict or the plaintiff was nonsuited. There

Costs before
Judicial
Acts

^a Marshall on Costs, 1; Hullock on Costs, 1; 3 Bl. Com. 399.

^b See Gray on Costs, 7; Marshall, 2 *et seq.*, and remarks of Lord Blackburn in *Garnett v. Bradley*, 3 App. C. at pp. 961, 962: 48 L.J. Ex. 186.

^c (1) 52 Hen. iii. c. 6 (St. Marleberge), giving a defendant costs of suit in cases relating to wardship in chivalry; (2) 3 Hen. vii. c. 10, and 19 Hen. vii. c. 20, giving costs to a defendant in error; and (3) 7 Hen. viii. c. 19, giving a defendant costs in replevin. Marshall, 4.

were several other statutes giving costs,^a but all these statutes went on one principle throughout; the result being that, as a general rule, the party who succeeded got his costs, whether he was plaintiff or defendant, whether he succeeded by a verdict or upon demurrer, *i.e.*, the successful party got his ordinary taxed costs. In other words, the costs followed the event, and the party who was successful had them as a matter of course, subject, however, to several exceptions made in particular cases by certain statutes.^b The practice as to costs followed in the Courts of Common Law before the passing of the Judicature Acts, 1873-1875, in cases where there were several issues to be decided, is very concisely stated by *Thesiger L.J.* in *Myers v. Defries*,^c as follows: "Under the Common Law Procedure Act, 1852, s. 41, except replevin and ejectment, causes of action by and against the same parties in the same rights might be joined in the same suit. Pursuant to the provisions of that and other statutes the defendant might, as regards some defences without and others with leave, plead several defences. The plaintiff, if he succeeded as to any of the causes of action alleged by him, was entitled to the general costs of the cause, although this right, if the damages recovered were small, was controlled to some extent by certain statutes such as 43 Eliz. c. 6, s. 2: 21 Jac. i. c. 16, s. 6: 3 & 4 Vic. c. 24, s. 2, and the statutes relating to the County Courts, the most recent of which was the County Courts Act, 1867 (30 & 31 Vic. c. 142), s. 5. The defendant, however, was entitled to all the costs of the issues as to which he obtained the verdict."^d Inasmuch as the effect of the Judicature Acts and the Rules of Court has been to repeal the old law relating to costs, it has not been thought necessary to do more than merely draw attention to the numerous statutes which have been passed at various times on the subject.

Costs since
Judicature
Acts.

Order 65,
r. 1.

Passing, then, to the Judicature Acts, it may be stated, as a general rule, subject to certain exceptions which will be shortly mentioned, that costs are now *primâ facie* in the discretion of the Court or judge.^e The most important enactment which deals with the question of costs is *Order 65* of the Rules of Court. By

^a *E.g.*: 24 Hen. viii. c. 8: 13 Eliz. c. 2: 13 Car. ii. st. 2. c. 2, s. 3: 3 & 4 Will. iv. c. 42: 3 & 4 Will. iv. c. 43: 8 & 9 Vic. c. 11: 12 & 13 Vic. c. 106, and 15 & 16 Vic. c. 76. Marshall, pp. 4 *et seq.*

^b *Per Lord Blackburn* in *Garnett v. Bradley*, 3 App. C., at p. 962: 48 L.J. Ex. 186.

^c 5 Ex. D. p. 187: 48 L.J. Ex. 446.

^d *Myers v. Defries*, 5 Ex. D. 180, 187: 49 L.J. Ex. 266.

^e *Myers v. Defries*, *Siddons v. Lawrence*, 4 Ex. D. 176, 183: 48 L.J. Ex. 446.

Rule 1 of this order it is provided that, "Subject to the provisions of the Acts and these Rules, the costs of, and incident to, all proceedings in the Supreme Court shall be in the discretion of the Court or judge . . . Provided also, that where any action, cause, matter or issue is tried with a jury, the costs shall follow the event, unless the judge before whom such action, cause, matter or issue is tried or the Court shall for good cause otherwise order." The operation of Order 65 is as large as words can make it, and it was apparently designed to extend to *all* proceedings the discretionary power which formerly had only governed cases in equity; and it may be observed in passing, that the Rules of Court in almost all interlocutory proceedings and applications made to a judge previous to the trial leave the question of costs in the discretion of the Court or judge, who may make any order "upon such terms, as to costs or otherwise, as such Court or judge may think fit."

The general enactment of Order 65, then, is that costs shall be in the discretion of the Court, subject to the proviso which says that where an action is tried by a jury it is to be a different thing. If the plaintiff recovers when the action is tried before a judge alone the costs are not to be recovered absolutely, but are to be at the discretion of the judge. If the plaintiff recovers when the action is tried before a jury, there is to be a different rule—the costs shall follow the event—which means that the successful party, whether plaintiff or defendant, shall have his costs, *i.e.*, his ordinary taxed costs, "unless the judge before whom the action or issue is tried or the Court shall for good cause otherwise order."^a Although as a general rule costs are to follow the event in jury trials, it is to be noticed that even in that case the Act, by means of the proviso, still reserves to the judge the power of exercising his discretion over the costs. Thus it has been held that a judge has power to direct that a plaintiff shall pay the costs of the action although he obtains judgment for a small amount,^b and *Bramwell L.J.*, in the course of his judgment, remarked^c that "upon the words of the first portion of Order 55"—which are identical with those of the new Order 65—"I am strongly of opinion that it is within the power of the Court, although the plaintiff has succeeded to some extent, to compel him to pay the defendant's costs as well as his own: it appears clear to me that, where the action has been tried without a jury, the circumstance that the plaintiff

General effect of Order 65.

Where trial before judge alone.

Where trial with jury.

Discretion of Judge over costs.

^a *Garnett v. Bradley*, 3 App. C., 964, 965 : *per Lord Blackburn* : see also remarks of *Bramwell L.J.* in *Myers v. Defries*, 4 Ex. D. at p. 182 : 48 L.J. Ex. 446.

^b *Harris v. Petherick*, 4 Q.B. D. 611 and at p. 613 : 48 L.J. Q.B. 521.

^c *Harris v. Petherick*, 4 Q.B. D. at p. 612.

Successful defendant cannot be ordered to pay costs of action.

Successful defendant may be deprived of costs.

has recovered something will not of itself relieve him from liability to pay the defendant's costs." ^a The proviso at the end of the order does not take away that power: the only difference under the new Order 65 would seem to be that if the action is tried before a jury, it is requisite that there should be some "good cause" for depriving a successful plaintiff of his costs; and when there is, the judge or Court has the same absolute discretion as if the action had been tried without a jury. It would seem that the Court or a judge has no jurisdiction to make a successful defendant pay the costs of an action, even though Order 65, r. 1, gives an absolute discretion as to costs. That order adopts, with the same limitations, the jurisdiction as to costs which existed formerly in the Court of Chancery. ^b Thus it has been held that no order could be made against a defendant to pay the costs of the litigation where he has wholly succeeded in the action. ^c But the Court has a discretion to deprive a defendant of his costs though he succeeds in the action, and to make him pay perhaps the greater part of the costs by giving against him the costs of issues on which he fails, or costs in respect of misconduct by him in the course of the action. ^d In other words, if the defendant fails as regards some of the issues or misbehaves himself, he may, although successful, have to pay the costs caused by such failure or misbehaviour. ^e But there is an essential difference between a plaintiff and a defendant; for a plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into Court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there. ^f The present Order 65, r. 1, differs from the annulled Order 55 in this that the judge who tries the case need not exercise the power which is given to him over the costs *at the trial*, or as it was decided, "substantially at the trial," because

^a See also remarks of *Brett L.J.* to same effect in *Harris v. Petherick*, 4 Q.B. D. at p. 613.

^b See *In re Foster v. G. W. R. Co.*, 8 Q.B. D. 515; 51 L.J. Q.B. 233, *per Brett L.J.*; this case deals with Order 55, r. 1, of R.S.C. 1875, but the remarks apply to Order 65, r. 1, of R.S.C. 1883.

^c *Witt v. Corcoran*, 2 Ch.D. 69; 45 L.J.Ch. 603; *Dicks v. Yates*, 18 Ch.D. 76, 84; 50 L.J.Ch. 809; *Tidwell v. Ariel*, 3 Madd. 403, 409; *Cooth v. Jackson*, 2 Ves. 11, 40; *Clarke v. Hart*, 6 H.L. Cas. 632, 667; 27 L.J.Ch. 615, 620; *Daniell's Ch. Pr.* 1238 (ed. 5).

^d *Per Jessel M.R.* in *Dicks v. Yates*, *supra* at p. 84; see also *Dufour v. Sigel*, 4 De G.M. & G. 520; 22 L.J. Ch. 678.

^e *Per Brett L.J.*; see *In re Foster v. G. W. R. Co.*, 51 L.J. Q.B. at p. 236.

^f *Per James L.J.* in *Dicks v. Yates*, 18 Ch. D. at p. 85. As to the power of an arbitrator to make a successful party pay all the costs see *Fearon v. Flinn*, L.R. 5 C.P. 34.

the words "upon application made *at the trial* for good cause shewn," which were contained in the former Order 55, have been omitted from Order 65. The recent decisions upon that subject which were very conflicting are therefore of little practical value.*

The right to costs does not in most cases merely depend upon the merits of the cause as finally decided, but may to a very great extent depend upon the mode in which it has been conducted by the parties;^b and in exercising his discretion therefore to deprive a successful party of costs, the judge is not confined to the consideration of the conduct of the party in the course of the litigation only, but may consider his conduct previous to and conducing to the action. The judge must, however, assume the truth of the facts found by the jury.^c Thus where in an action for a libel contained in a letter written by the wife of the defendant the judge was of opinion, although the plaintiff recovered a verdict for £10, that he had brought the whole thing upon himself by his incautious conduct, and for that reason deprived him of his costs, the Court of Appeal refused to interfere with the judge's order on the grounds already stated.

Discretion of Judge over costs how to be exercised

It has also been held in *Myers v. Defries*^d that by the words "or the Court shall otherwise order," contained in the latter part of the annulled Order 55, a power is given to the Court independently of and other than that given by way of appeal from the judge, or where the case is brought before the Court on a new trial, and that the Divisional Court has under that order an original jurisdiction to make an order depriving a successful party of the costs of an action tried before a jury, and that it has a discretion in the matter with which the Court of Appeal has no power to interfere.^e It may be that the Court in accordance with the opinion expressed by *Bramwell L.J.* in *Myers v. Defries*, as to the meaning of the old Order 55, will not, when exercising the jurisdiction given by that order, and now by Order 65, "otherwise order except where upon con-

Meaning "shall otherwise order."

* See *Collins v. Welch*, L.R. 5 C.P. D. 27 : 49 L.J. C.P. 260 ; *Harris v. Petherick*, L.R. 4 Q.B. D. 611 : 48 L.J. Q.B. 521 ; *Baker v. Oakes*, L.R. 2 Q.B. D. 171 : 46 L.J. Q.B. 246 ; *Tyne Alkali Co. v. Lawson*, 36 L.T. N.S. 100 ; *General St. Nav. Co. v. Lond. and Edinburgh Shipping Co.*, L.R. 2 Ex. D. 467 : 47 L.J. Ex. 77 ; *Kynaston v. Mackinder*, 47 L.J. Q.B. 76.

^b *Per Lord Watson* in *Metropolitan Asylum District v. Hill*, 5 App. C. at p. 586.

^c *Harnett v. Vise*, 5 Ex. D. 307.

^d *Per Bramwell L.J.* 4 Ex. D. at p. 181 : 48 L.J. Ex. 446.

^e *Per Thesiger L.J.* S. C. at p. 183 ; but see *Turner v. Heyland*, 4 C.P. D. 432 : 48 L.J. C.P. 535, where a judge at Nisi Prius of his own motion and without any direct application, made an order preventing the costs following the event.

Court of Appeal has no original jurisdiction over costs of action.

Jurisdiction of Judge at Chambers over costs of action.

Jurisdiction of Divisional Court over costs of action.

Application for costs of action, when to be made.

No appeal as to costs only without leave.

Appeal lies from order imposing condition of payment of costs.

sideration there is something to induce them to overrule that presumption which the legislature has declared in favour of the litigant who has had a cause tried before a jury, and in whose favour the event has been decided." The Court of Appeal, moreover, has no original jurisdiction to make an order as to such costs.^a

It was held that under the annulled Order 55, r. 1, a judge at chambers has no jurisdiction to make an order as to the costs of an action tried by a jury, whether he was the judge at the trial or not, upon the ground that such order confined the power to the Divisional Court.^b This may be so where the judge at chambers is not the judge who tried the case; but the words of the new Order 65—namely, unless the judge before whom the action is tried, or the Court shall for good cause otherwise order—are so general that it may perhaps now be competent for the judge before whom the action was tried to deal with the costs of the action afterwards at chambers. But it is submitted that the application would run the risk of being refused if not made within a reasonable time after the trial.

The jurisdiction of the Divisional Court to deal with the costs of an action tried before a jury is an *alternative*, and not an appellate jurisdiction.^c Where, therefore, the judge before whom the action was tried has not exercised any discretion in the matter, the Divisional Court can do so.

The application to the Divisional Court to exercise the alternative jurisdiction given by the rule should be made within a reasonable time after the trial.^d

Section 49 of the Judicature Act, 1873, enacts that "no order made by the High Court of Justice or any judge thereof, by the consent of parties or *as to costs only* which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or judge making such order."

The House of Lords with regard to that section have decided that an appeal must not be brought for costs or in relation to costs only.^e But a condition that imposes upon one party or the other as the price of an order which is to be made, or permitted to stand in his favour, some election to be made by him as to the payment of costs does not come within the above-mentioned rule applying to an appeal for costs only.^f In the

^a *Per Brett L.J.* in *Baker v. Oakes*, 2 Q.B. D. at p. 176: 46 L.J. Q.B. 246.

^b *Baker v. Oakes*, 2 Q.B. D. 171: 46 L.J. Q.B. 246.

^c *Marsden v. Lanc. and Yorkshire R. Co.*, 7 Q.B. D. 641: 50 L.J. Q.B. 318.

^d *Bowey v. Bell*, 4 Q.B. D. 95: 48 L.J. Q.B. 161.

^e *Metropolitan Asylum District v. Hill*, 5 App. C. 582: 49 L.J. Q.B. 745.

^f *Per Lord Selborne* in *Metropolitan Asylum District v. Hill*, *supra* p. 585.

case referred to, the Divisional Court granted a new trial on the ground that the findings of the jury upon the evidence were not satisfactory; and as part of that order reserved the question of costs. An appeal from that order was taken to the Court of Appeal, the object of which was to discharge the order for the new trial. The Court of Appeal conditionally discharged the order for the new trial, and in the alternative conditionally dismissed the appeal upon payment within a certain time of the costs of the first trial. The House of Lords held that under these circumstances the case did not fall within the rule applying to an appeal for costs or in relation to costs only, and heard the appeal.^a The right of a party to appeal, where the question raised is as to the principle upon which costs are to be allowed or refused, is not taken away by Section 49 of the Judicature Act, 1873, for that section applies only to a case where a judge has a *discretion*, and has exercised it in giving or refusing costs.^b

Appeal lies on a question of principle.

But it would seem that there may be some cases in which an appeal might lie from the discretion of the judge; for *Brett L.J.* in *Collins v. Welch*^c expressed the opinion that the word "good" in the expression "for good cause" was inserted in Order 55, r. 1—now Order 65—for the purpose of giving an appeal from the judge's decision on the question of costs; but that remark, it is to be observed, is applicable to cases only where the action is tried with a jury.

Section 49 applies to orders as to costs made in Interpleader proceedings as well as to orders in other proceedings in the High Court.^d

s. 49 applies to Interpleader.

But an order that the costs of an application at chambers on behalf of a client shall be paid by his solicitor personally is within section 49, and therefore not subject to any appeal except by leave.^e So also there is no appeal except by leave from an order made by a judge at chambers that a plaintiff should pay the costs of inspecting the defendant's property, for these are costs which by law are left to the discretion of the judge.^f This latter decision, however, seems to be inconsistent with that of the House of Lords in the case of the *Metropolitan Asylum District v. Hill*.

^a *Metropolitan Asylum District v. Hill*, *supra*.

^b *Marcus v. General Steam Navigation Co.*, W.N. 1876, p. 157: 35 L.T. N.S. 353. *Per Jessel M.R.*

^c 5 C.P. D. 27, 38: 49 L.J. C.P. 260.

^d *Harmont v. Forster*, 8 Q.B. D. 82: 51 L.J. Q.B. 12.

^e *In re Bradford*, 11 Q.B. Div. 373.

^f *Mitchell v. The Darley Main Colliery Co.*, 10 Q.B. D. 457: 52 L.J. Q.B. 394; *see* Order 50, r. 3.

s. 49 does
not apply
to order of
Master or
District
Registrar.

The section, however, does not apply to the order of a judge or district-registrar, and consequently a judge has power to make any order as to costs made by either of them; as for instance, an order dismissing without costs an action for want of prosecution.^a

^a *Foster v. Edwards*, 48 L.J. Q.B. 767.

CHAPTER II.

COSTS WHERE ACTION TRIED WITH A JURY.

IN the preceding chapter the question of costs was, *inter alia*, treated of in those cases where an action has been tried first *without* a jury and secondly *with* a jury, and the judge at the trial has made an order as to costs within the meaning of the proviso contained in Order 65.

The next branch of the subject relates to those cases where an action has been tried with a jury, and no order has been made as to costs.

The general rule contained in the proviso to Order 65 is that in such a case *the costs shall follow the event*; but this rule must be understood as being subject to any liability to be deprived of such costs which may arise under any statutory enactment, as, for instance, by the operation of the County Courts Act, 1867, section 5, which has been specially preserved by section 67 of the Judicature Act, 1873, and which will be more fully dealt with hereafter.^a

Rule as to costs when action tried with jury.

The leading case on the subject is *Garnett v. Bradley*,^b decided in the House of Lords, in which it was held that where in an action of slander a plaintiff recovers a farthing damages, he will, in the absence of any order to the contrary, be entitled to his costs, because the "event" has been decided in his favour.^c So also in *Parsons v. Tinling*,^d which was an action for libel, the plaintiff recovered a farthing damages, and the judge at the trial having refused to give any certificate with regard to costs, the plaintiff would, upon the same ground, have been entitled to his costs.

The "event" which the costs of an action follow has been the subject of discussion in several cases. The shortest definition of the word as applied to the question of costs is that

"Event," meaning term generally.

^a *Post*: chap. 3.

^b 3 App. Cases, 944: 48 L.J. Ex. 186.

^c As to the effect of the Judicature Act, 1873, Sect. 67, and the annulled order 55, on cases in which the County Court cannot give relief, *see per Lord Blackburn*: *Garnett v. Bradley*, 3 App. C. at p. 971: and chap. 3, *post*.

^d 2 C.P. D. 119: 46 L.J. C.P. 230.

given by *Brett L.J.* in *Collins v. Welch*,^a namely, "Event must be the event of the trial—it means the finding and the judgment ;"^b and *Kelly C.B.*, in an earlier case,^c said that the "event" which the costs followed was the conclusion of the whole matter or proceeding, which commenced with the writ of summons and ended with the final judgment ; and that the party who succeeded in his action was in the absence of any special directions entitled to the whole costs of the entire action. In the case last referred to^d the plaintiff recovered a verdict in an action for personal injuries, but the Divisional Court ordered a new trial unless the plaintiff consented to certain terms. No direction as to costs was given, and the plaintiff would not consent to the terms. A new trial was then had and a verdict was entered for the plaintiff, and it was held that the plaintiff was entitled to the costs of the first trial, as part of the costs of the action, which, under the Order, follow the event. "One plain rule," said *Mellor J.*, in delivering judgment, "now governs all these cases, the costs are to follow the event and the event is *the result of the entire litigation*. In this case the first trial was not like an interlocutory application, nor was it an abortive issue ; it was one of the stages in the whole proceedings which ended in the judgment in favour of the plaintiff. The plaintiff is therefore entitled to the natural consequences of this judgment, and they include the costs of the whole case. All the proceedings here were but stages of one litigation which has finally ended in a verdict in favour of the plaintiff."^e

This last-mentioned case followed the decision of the Court of Appeal in *Green v. Wright*^f on the very same point. There, on the trial of an action, a nonsuit was directed, which, however, was set aside and a new trial granted. On the second trial the plaintiff had a verdict and judgment, and it was held that he was entitled to the costs of the first trial and of the rule for a new trial as part of the costs which followed the event. "In my opinion," said *Lord Coleridge C.J.*, "the event is the ultimate event of the second verdict, and the costs are all the costs of and incidental to the proceedings leading up to that event, including the costs of the first trial. If the action had ended with the nonsuit, that would have been the event."^g It was also stated by *Brett L.J.*, that the costs which follow the

^a 5 C.P. D. 27 : 49 L.J. C.P. 260.

^b 5 C.P. D. at p. 33.

^c *Field v. G. N. R.* 3 Ex. D. 261, at p. 262 : 47 L.J. Ex. 662.

^d *Field v. G. N. R.* *supra*.

^e *Field v. G. N. R.* *supra* : at p. 26.

^f 2 C.P. D. 354 : 46 L.J. C.P. 427.

^g *Green v. Wright*, 2 C.P. D. at p. 355.

event are "all the costs of and incidental to the proceedings, that is, all costs that have been fairly incurred in the course of the action."^a In a later case, also, *Bramwell L.J.*, said that "the word 'event' cannot mean the event of the verdict, because it is possible that upon the only question in issue before the jury the verdict might be for one party, and yet the judge upon the whole case might give judgment for the other It cannot possibly mean that the costs of the action shall follow the verdict of the jury I assume it must mean this:— That where any action is tried by a jury the costs of the cause shall follow the event of the cause."^b

The question as to what is the "event" when money is paid into Court by the defendant generally was considered in *Langridge v. Campbell*.^c

"Event" where money paid into Court

There the action was brought to recover £373, the balance of an account for work, labour, and materials supplied to the defendant by the plaintiffs after giving credit for the payment of £650. The defendant paid £200 into Court, at the same time giving the statutory notice^d that "that sum is sufficient to satisfy the plaintiffs' claim." The plaintiffs took the money out of Court,^e but did not give the statutory notice^f that they accepted the same in satisfaction of the causes of action in respect of which it had been paid in, and in fact gave no notice at all. The action was then referred to arbitration^g upon the terms, "costs of the cause to abide the event; costs of the reference to be in the discretion of the arbitrator." No pleadings were delivered by either party, and the arbitrator certified that the sum paid in was sufficient to satisfy the plaintiffs' claim, and he directed the parties to pay their own costs of the reference, and that the costs of the certificate should be equally divided between them.

Under these circumstances it was held that the plaintiffs were not entitled to any costs, and that the defendant was entitled to the costs from the commencement of the action, because the £200 had been paid into Court generally in respect of the whole cause of action, and the costs of the cause were to abide the "event." The "event" here was whether the £200 was sufficient to satisfy the plaintiffs' claim, and the "event" was

^a *Green v. Wright*, *supra* at p. 356.

^b *Myers v. Defries*; *Siddons v. Lawrence*: 4 Ex. D. 176, 180: 48 L.J. Ex. 446.

^c 2 Ex. D. 281: 46 L.J. Ex. 277.

^d Under Order 31, r. 1, and *see post*. tit.: payment into Court.

^e Under Order 30, r. 3.

^f Under Order 30, r. 4.

^g Under Common Law Procedure Act, 1854 (17 and 18 Vic. c. 125), s. 3.

that the plaintiffs recovered nothing beyond the sum paid into Court. This, it is to be observed, was a case where there were no pleadings, unless the statutory notice given by the defendant can be regarded as such.

A somewhat different principle seems to have been followed in the later case of *Buckton v. Higgs*,^a in which the plaintiff claimed £500 for breach of a covenant to keep a house in repair; the defendant, by his statement of defence, traversed the breach, denied all liability, and paid £150 into Court, alleging that that sum was sufficient to satisfy the plaintiff's claim. The issue as to whether this sum was sufficient or not was referred to an official referee, who reported that it was sufficient to cover any just claim made by the plaintiff. The Court^b held that the costs were in their discretion, and that the proper mode of exercising that discretion was by giving the plaintiff his costs of the action up to the time of payment into Court, and the defendant his costs of the action after that time. *Langridge v. Campbell*^c was discussed, but the decision in that case was expressly limited to cases in which there are no pleadings.^d This would appear to be a somewhat refined distinction, for in both cases the substantial question for decision was, whether the sum paid into Court was sufficient to satisfy the plaintiff's claim, and in both cases it was found that that sum was sufficient.

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The "event" of an action is in certain cases *complex*, as, for instance, where there are distinct causes of action, in which case the word is to be read "distributively" and the general costs of the action will follow the judgment, but the costs of the particular issues will have to be respectively taxed in favour of the party who has succeeded on them.^e Thus in *Myers v. Defries*^f the plaintiff claimed damages in respect of three distinct causes of action, viz., malicious proceedings in bankruptcy, libel and slander, and trespass. Upon the first trial the plaintiff succeeded in obtaining damages for a substantial amount, but the finding of the jury being deemed unsatisfactory a new trial was ordered. At the second trial the plaintiff obtained a find-

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^a 4 Ex. D. 174.

^b Kelly CB. and Hawkins J.

^c 2 Ex. D. 281, 46 L.J. Ex. 277: see also remarks of Patteson J., in *Rumbelow v. Whalley*, 16 Q.B. 397, 401: 20 L.J. Q.B. 262 as to payment into Court and its effect formerly where plaintiff replied that the sum paid in was not enough: see also *Reid v. Ashley*, 22 L.J. C.P. 215.

^d *Buckton v. Higgs*: 4 Ex. D. 174, at p. 175.

^e *Myers v. Defries*: 5 Ex. D. 15, 180, 188 *per Thesiger L.J.*: 49 L.J. Ex. 266.

^f 5 Ex. D. 15, in Court of Appeal at p. 180.

ing in his favour as to the claim for libel, the damages being assessed at one farthing: but the jury found for the defendants as to the other causes of action. A motion being made to deprive the plaintiff of costs, the Court of Appeal held that there was jurisdiction in the Divisional Court to order that they should not be taxed in his favour. The defendants then claimed the costs of the issues found by the jury in their favour, and the Court of Appeal confirming the view taken by the master on taxation and subsequently by the Divisional Court held that the defendants were entitled to these costs. *Bramwell L.J.*, in the course of his judgment, remarked that "*Event* means not merely the finding of the jury, but the event of the cause. If the plaintiff relies on several grounds of suit there may be several *events*, and in my opinion *event* may be read as a *nomen collectivum*. . . . The meaning to be ascribed to the proviso, as it stands, is that where there are several events, costs shall follow the events respectively. The question remains who shall recover the general costs of the cause? The plaintiff will be entitled to recover all those costs which have been incurred in producing the result in his favour; the defendants will get all costs of resisting those parts of the plaintiff's claim which have been defeated. Upon this view the plaintiff, if he is not deprived of his costs either by order of the judge or under the County Courts Acts, will still be entitled to the general costs of the cause, from which must be deducted the costs of the portions of his claim, as to which the defendants have succeeded."^a The view taken by the Court of Appeal was in accordance with the practice which formerly existed in the Courts of Common Law,^b and which had been followed on taxation of costs since the Judicature Acts; and *Bramwell L.J.*, in the same case said, "I quite agree that the old law as to costs is gone; but we may look upon it as a guide; for the former rules as to apportioning the liability for costs were in themselves reasonable, and ought to be followed wherever it is practicable."^c And in an earlier case, the same learned Judge remarked that, "If it were possible to apportion the costs of the issues between the parties, perhaps it would in some cases, especially in actions for slander where the damages are assessed at a farthing, be a most satisfactory manner of concluding a

"distributively" where there are several causes of action.

Apportionment of costs, where there are several events.

^a *Myers v. Defries*, 5 Ex. D. at p. 185.

^b By the Common Law Procedure Act, 1852, s. 81, it was provided "That the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue and be adjudged to the successful party, whatever may be the result of the other issue or issues." See now Order 65, r. 2.

^c *Myers v. Defries*, 5 Ex. D. at p. 184.

litigation in which, at least technically, both the plaintiff and the defendant are to blame.”^a

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In *Blake v. Appleyard*^b it was held that although a plaintiff might be entitled to the costs of the cause generally, yet the defendant was entitled to the costs of a counterclaim upon which he had succeeded. In this case the plaintiff proved a claim for £40 and the defendant a counterclaim for £10, but no order was made as to costs, and it was held that the plaintiff was entitled to the general costs of the action, and the defendant to the costs of those matters on which he had succeeded, *i.e.*, the costs of proving his counterclaim and of the issues so far as they related thereto.

In the earlier case of *Staples v. Young*,^c a decision upon which some doubt has been thrown by a recent decision,^d it was held that where, in an action, there was a claim, and also a counterclaim, the plaintiff's right to costs was to be decided with reference to the balance recovered, and not to the amount proved. If, therefore, a plaintiff recovered £25 in an action of contract, but the defendant recovered on his counterclaim £20, the plaintiffs' right to costs would depend upon the balance of £5, and if no order as to costs is made he would get no costs, as he had recovered a sum which at law^e did not entitle him to any costs. It is somewhat difficult, as was remarked by *Denman J.* in *Potter v. Chambers*,^f to reconcile the principles upon which the two cases of *Staples v. Young*,^g and *Blake v. Appleyard*^h were decided.

In the former case,ⁱ *Pollock B.* was of opinion that the intention of the Judicature Acts was to treat a counterclaim as though it were a set-off, and with regard to the trial and the result of it in the matter of costs, to place them on the same footing; but in the recent case of *Stooke v. Taylor*,^j a contrary opinion was expressed by *Cockburn C.J.*, who, in the course of his judgment remarked,^k “the law as to the difference between

^a *Harris v. Petherick* : 4 Q.B. D. 611, at p. 612. *Per Bramwell LJ* : 48 L.J. Q.B. 521.

^b 3 Ex. D. 195 : 47 L.J. Ex. 407 : see also *Hallinan v. Price*, 41 L.T. N.S. 621.

^c 2 Ex. D. 324.

^d *Stooke v. Taylor*, 5 Q.B. D. 569.

^e County Courts Act, 1867 (30 & 31 Vic. c. 142), s. 5.

^f 4 C.P. D. 69 at p. 72. C.A. at p. 457 : 48 L.J. C.P. 274.

^g 2 Ex. D. 324.

^h 3 Ex. D. 195 : 47 L.J. Ex. 407.

ⁱ *Staples v. Young*, 2 Ex. D. at p. 327.

^j 5 Q.B. D. 569 : 49 L.J. Q.B. 857. And see *Neale v. Clarke*, 4 Ex. D. 286.

^k 49 L.J. Q.B. at p. 862

set-off and counterclaim is correctly stated by Mr. Pitt Lewis in his very useful book on County Court Practice, p. 321, 'a set-off,' he says, 'would seem to be of a different nature from a counterclaim, inasmuch as a set-off appears to show a debt balancing the debt claimed by the plaintiff, and thus leaving nothing due to him; while a counterclaim, it would seem, consists of a crossclaim, not necessarily extinguishing or destroying the plaintiff's demand. In other words, a set-off appears to consist of a defence to the original claim of the plaintiff; a counterclaim is the assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff. The right to rely on a set-off has long existed. The right to set up a counterclaim was first given by the Judicature Act.' In *Winterfeld v. Bradnum*,^a *Brett L.J.* says: 'a counterclaim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counterclaim is that they are wholly independent suits, which for convenience of procedure are combined in one action. I know that a practice has arisen, that if the counterclaim overtops the plaintiff's claim, judgment is entered for the defendant, and costs given accordingly. But I think that the allocatur should only be for the difference of the costs between the respective parties.' *Myers v. Defries*,^b was, therefore, in my opinion rightly decided, where it was held that where the plaintiff succeeded in his claim, and the defendant on his counterclaim, the word 'event' in Order 55, was to be read distributively, and each party was entitled to his costs. I am, therefore, of opinion that, while under the special enactments of the statutes relating to set-off, a plaintiff recovers no more than the amount of his claim as reduced by the set-off, the effect of a counterclaim is altogether different, and that where such a claim is set up as a cross-action, each party recovers the amount of his claim, although by a wise and salutary provision, the party establishing his claim for the larger amount, whether plaintiff or defendant, obtains judgment for the excess only of his claim over that of the other. It appears to me, therefore, that the contention of the defendant founded on the authority of *Staples v. Young*,^c and the reasoning in that case, that a plaintiff does not recover the amount which he establishes on his own claim, when the amount for which he can have judgment is reduced by the counterclaim, is unsound, and ought

Counter-
claim over-
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^a 3 Q.B. D. 324, at p. 326 : 47 L.J. 270 (Divisional Court).

^b 5 Ex. D. 15, 180 : 49 L.J. Ex. 266.

^c 2 Ex. D. 324.

not to prevail.”^a These remarks of *Cockburn CJ.* have been quoted *in extenso* because they seem so clearly to explain the difference which exists between a set-off under the old law, and a counterclaim under the Judicature Acts.^b

In *Potter v. Chambers*,^c the plaintiffs established a claim for a sum exceeding £50, and the defendant by his counterclaim recovered a sum which left a balance in favour of the plaintiffs for a sum of £4 12s. only, and no order having been made to deprive them of costs, it was held that they were entitled to their costs. The case, however, was decided on the ground that the relief sought by the plaintiffs was not relief which could have been given by a county court within the meaning of the Judicature Act, 1873, s. 67,^d and that the case was therefore distinguishable from *Staples v. Young*,^e where it appeared that the plaintiff had only established his claim to an amount under £50, a claim which could have been entertained by the county court, and that, therefore, the question did not turn upon the meaning of the words “relief sought” as used in sec. 67.

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The general principle laid down in *Myers v. Defries*,^f and *Blake v. Appleyard*,^g that a party is entitled to the costs of those issues which have been decided in his favour was followed in *Davidson v. Gray*,^h where it seems to have been considered that although the finding was in favour of the plaintiff, the defendants were entitled to the costs of their counterclaim upon which they had succeeded.ⁱ

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But r. 2 of Order 65 now provides that “when issues in fact and law are raised upon a claim or counterclaim the costs of the several issues respectively both in law and fact shall, unless otherwise ordered, follow the event.” The meaning of this rule is not, it is submitted, that the costs of the several issues should follow the “event” in the sense in which that word is used—that is, the event of the action—in Order 65, r. 1, but the event of such issues severally. So that a party for whom judgment is ultimately entered, and who would be entitled to the general costs of the action would not be entitled to the costs of those

^a *Stooke v. Taylor*, 5 Q.B. D. 569, at pp. 577 *et seq.*

^b See also remarks of Hawkins J. on the same subject in *Neale v. Clarke*, 4 Ex. D. at p. 295.

^c 4 C.P. D. 457, C.A. : 48 L.J. C.P. 274.

^d As to this see chap. 3, *post*.

^e 2 Ex. D. 324.

^f 5 Ex. D. 15, 180 : 49 L.J. Ex. 266.

^g 3 Ex. D. 195 : 47 L.J. Ex. 407.

^h 5 Ex. D. at p. 189 (*n*). The judgments are reported fully 40 L.T. N.S. 192 : affirmed in C.A. 42 L.T. N.S. 834.

ⁱ See remarks of Thesiger L.J. in *Myers v. Defries*, 5 Ex. D. at p. 188.

issues upon which the other party had succeeded ; if it were otherwise, and the costs of the issues in fact or law were to follow the event of the action, a party for whom judgment is ultimately entered, would be entitled to the costs of those issues upon which he had failed. It would seem, however, that if the plaintiff is deprived of his costs under sec. 5 of the County Courts Act, 1867, he would not be entitled to the costs of the issues either in fact or law ; because that section disentitles him altogether to any costs if he recovers less than the statutory amounts therein specified ; and does not obtain the necessary certificate or order for costs.

Where in an action for a liquidated money claim, the judgment which after trial with a jury was entered for the plaintiff on his claim, and for the defendants for the balance on their counterclaim for goods sold, the amount of which exceeded that of the plaintiff's claim, directed that the plaintiff should recover against the defendant his costs of issue, and that the defendants should recover the costs of their counterclaim, the master, on taxation allowed the defendant the general costs of the cause, but the Court of Appeal held that the plaintiff was entitled to those costs. The decision did not turn upon the question whether the plaintiff was entitled upon principle to the costs of the action, but solely whether the costs had been rightly taxed under the order and judgment then before the Court.^a

Where certain issues were tried by an official referee who found that the defendant was indebted to the plaintiff on his claim for £32 18s. 6d., and the plaintiff to the defendant on his counterclaim for £34 10s. 6d., leaving a balance of £1 12s. 0d. due to the defendant, the Court gave the costs of the cause to the defendant upon the ground that the counterclaim was not an independent counterclaim, but was really a defence to the plaintiff's claim.^b

The difficulty which has hitherto been experienced on this subject would seem to be now obviated by Order 21, r. 17, which provides that where in any action a set-off or counterclaim is established as a defence against the plaintiff's claim, the Court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

Judgment
for defend-
ant for
balance.

A set-off or counterclaim has the same effect as a cross action, so as to allow the Court to pronounce a final judgment

Effect of
counter-
claim.

^a *Baines v. Bromley*, 6 Q.B. D. 691 : 50 L.J. Q.B. 465.

^b *Lowe v. Holme*, 10 Q.B. D. 286 : 52 L.J. Q.B. 270.

in the same action, both on the original and on the cross-claim. (Order 19, r. 3.)^a

The effect of these two rules will, it is submitted, be, that in general the party for whom final judgment is given will be entitled to the costs of the cause unless deprived of the same, either by an order made under Order 65 ; or, further, if a plaintiff, under the provisions of section 5 of the County Courts Act, 1867.^b

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Where an action is ordered to be tried in a County Court under the provisions of 19 & 20 Vic. c. 108, s. 26, the costs of the action shall, subject to the provisions of the principal Act and these Rules, *follow the event*, unless by the Registrar's certificate of the result of the trial it shall appear that the judge before whom the action was tried was of opinion that the question of costs ought to be referred to a judge of the High Court, in which case no costs shall be recovered unless ordered by the Court or a judge. (Order 65, r. 4.)

It has been decided that where an action has been ordered to be tried in the County Court under section 26, the action itself remains in the High Court, which still retains the power over the costs which is conferred by Order 65 ; whilst the County Court Judge has no jurisdiction at all over them, and will now only be able to certify as provided by the above-mentioned rule 4.^c

summary. It may be convenient here shortly to summarize the effect of the cases already referred to touching the general question as to a party's right to costs, where such costs have not been taken away under Order 65, or under the provisions of the County Courts Act, 1867.^d

(1.) The general rule is that where an action is tried with a jury, costs follow the event unless otherwise ordered—and that means that the successful party, whether plaintiff or defendant, shall have his costs, *i.e.*, his ordinary taxed costs.^e

(2.) If there are several events, the costs will follow the events respectively. Thus, if the plaintiff substantially succeeds as to one event and fails as to the rest, he will, if judgment is entered in his favour, be entitled to the general costs of the action, and also to all the costs incurred in producing that result in his

^a As to the apportionment of the costs of issues *see post* chap. 21.

^b *See* chap. 3.

^c *Farmer v. May*, 50 L.J. Q.B. 295.

^d 30 & 31 Vic. c. 142, s. 5 : as to the operation of this Act on the question of costs *see* chap. 3.

^e *See* remarks of Lord Blackburn in *Garnett v. Bradley*, 3 App. C. 944, 962 : 48 L.J. Ex. 186.

favour: while the defendant will be entitled to the costs of resisting all those parts of the plaintiff's claim which have been defeated.^a

(3.) If there are several events, and the plaintiff fails as regards all of them, then the defendant will be entitled to the general costs of the action, and to the costs of the several issues upon which he has succeeded.

(4.) Although the plaintiff may be entitled to the costs of the cause generally, yet the defendant is entitled to the costs of proving a counterclaim upon which he has succeeded.^b

(5.) It would also seem that a plaintiff who has succeeded in establishing his right to recover on his claim, will not be entitled to the general costs of the action where the defendant may have proved a counterclaim for a larger amount than that which the plaintiff has established his right to recover, if judgment *for the balance* is entered in favour of the defendant.^c

(6.) If an action is referred to arbitration upon the terms "costs to abide the event," the party in whose favour judgment is entered will be entitled to the costs of the cause.^d

(7.) Where an action is referred under the Common Law Procedure Act, 1854, and the order of reference is silent as to costs, the successful party is not entitled to any costs.^e

^a *Myers v. Defries*, 5 Ex. D. at pp. 184, 185: *Per Bramwell L.J.*: 49 L.J. Ex. 266. As to apportionment of costs of issues *see* Order 65, r. 2.

^b *See* Order 65, r. 2; *Blake v. Appleyard*, 3 Ex. D. 195: 47 L.J. Ex. 407; *Davidson v. Gray*, 5 Ex. D. 189 (*n.*): 40 L.T. N.S. 192; but *see Stooke v. Taylor*, 5 Q.B. D. 569: 49 L.J. Q.B. 857; *Neale v. Clarke*, 4 Ex. D. 286; *Cole v. Firth*, 4 Ex. D. 301 (*n.*): 40 L.T. N.S. 851.

^c Order 21, r. 17, and *see* remarks of *Kelly C.B.* in *Cole v. Firth*, 40 L.T. N.S. at p. 855.

^d *See* chap. 5; *Chatfield v. Sedgwick*, 4 C.P. D. 383 (on Appeal), 459; but *see Stooke v. Taylor*, 5 Q.B. D. 569: 49 L.J. Q.B. 857.

^e *See* chap. 5; *Wimshurst v. Barrow Shipbuilding Co.*, 2 Q.B. D. 335: 46 L.J. Q.B. 477; *Leggo v. Young*, 16 C.B. 626: 24 L.J. C.P. 200; *Bell v. Postlethwaite*, 5 E. & B. 695: 25 L.J. Q.B. 63.

CHAPTER III.

THE EFFECT OF THE COUNTY COURTS ACT, 1867, UPON
COSTS.

Judicature Act, 1873, s. 67. INASMUCH as by *section 67* of the Judicature Act, 1873, it is enacted that "the provisions contained in the fifth, seventh, eighth, and tenth sections of the County Courts Act, 1867,^a shall apply to all actions commenced in the said High Court of Justice, in which any relief is sought which can be given in a County Court," it becomes necessary to consider the effect of those sections upon the plaintiff's right to his costs of action.

County Court Act, 1867, s. 5, applies to all actions in High Court where "relief sought" and obtainable in County Court. In the first place it is to be observed that by *section 67* the provisions of the County Courts Act, 1867, are to apply to *all* actions commenced in the High Court of Justice in which any relief is sought which can be given in a County Court.

This enactment does not affect cases in which a County Court cannot give relief, but it extends to all those actions, both legal and equitable, which can be commenced in a County Court. In other words it would seem that the effect of *section 67* is to confine the operation of the County Courts Act, 1867, (*sec. 5* in particular) to those cases in which the action can be brought in the County Court.

Excepted cases. There are several cases, however, in which the County Courts cannot give relief, and in which therefore the plaintiff will not be deprived of his costs, although he recovers less than the amounts specified in *sec. 5* of the County Courts Act, 1867, as amended by 45 & 46 Vic. c. 57, s. 4. These excepted cases are actions for malicious prosecution, libel or slander, seduction, and breach of promise of marriage;^b actions on contracts where the amount recovered exceeds £50;^c actions on any judgments of the Superior Courts;^d actions involving the title to realty, the annual value of which is less than £20;^e actions to recover a

^a 30 & 31 Vic. c. 142.^b 9 & 10 Vic. c. 95, s. 58.^c 13 & 14 Vic. c. 61, s. 1.^d 19 & 20 Vic. c. 108, s. 27.^e 30 & 31 Vic. c. 142, s. 12.

legacy or distributive share under an intestacy exceeding £50,^a or, if not exceeding £50, where the validity of such bequest or limitation is in dispute.^b Formerly, in these cases a plaintiff if successful was entitled to his costs, independently of the amount of damages recovered, provided that he was not deprived of them by any statutory enactment, as, for instance, by those statutes which formerly took them away where the damages were less than 40s.^c These latter statutes, however, have now been repealed by the Civil Procedure Acts Repeal Act 1879, and, as it would seem, by the effect of the Judicature Acts and Order 65 as to costs, and the rule now is that in such cases a plaintiff who recovers even a farthing damages is, in the absence of any order to the contrary made under Order 65, entitled to his costs.^d

Thus, where in an action of slander or libel, a plaintiff recovers a farthing damages, he will, in the absence of any order as to costs, be entitled to his costs of action,^e as the costs now follow the event.

By section 5 of the County Courts Act, 1867,^f it is provided County
Courts Act
1867, s. 5 that "If in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record the plaintiff shall recover a sum less than^g £20 if the action is founded on contract, or £10 if founded on tort, whether by verdict, judgment by default, or on demurrer,^h or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the Court or a judge at Chambers shall, by rule or order, allow such costs."

Formerly the plaintiff, in order to get his costs without a certificate had, under this section, to recover more than £20 if the action was founded on contract, or £10 if founded on tort, because the words of the section were "a sum not exceeding." But the words of the section are now "a sum less than," so that if he recovers £20 in an action founded on contract, or £10 in tort, he will not require a certificate in order to be entitled to his costs.

If the plaintiff comes within the terms of the statute he will

^a 9 & 10 Vic. c. 95, s. 58; 13 & 14 Vic. c. 61, s. 1.

^b 9 & 10 Vic. c. 95, s. 58.

^c 43 Eliz. c. 6, s. 2; 21 Jac. i. c. 16, s. 6; 22 & 23 Car. ii. c. 9; 3 & 4 Vic. c. 24; 31 & 32 Vic. c. 54, s. 6.

^d *Garnett v. Bradley*, 3 App. C. 944; 48 L.J. Ex 186.

^e *Garnett v. Bradley* *supra*, overruling *Parsons v. Tinsling*, 2 C.P. D. 119 (C.A.).

^f 30 & 31 Vic. c. 142.

^g See 45 & 46 Vic. c. 57, s. 4.

^h As to the effect of sec. 5 on judgment on issues of law or by default, see *post* chaps. 8, 11.

be deprived of his costs altogether in the absence of the certificate.^a So that he would not be entitled even to the costs of issues upon which he had succeeded at the trial. But the plaintiff is in a better position if he wholly fails in the action than if he partially succeeds, because in that event he would not be affected by the section, but would be entitled to the costs of any issues upon which he had succeeded.^b

s. 5 not
applicable
to counter-
claim.

Again, the section only affects a plaintiff's right to costs, and it has been held not to apply to a counterclaim. If, therefore, a defendant recovers less than the amounts specified in the section, he will not be deprived of his costs under that section.^c Nor does the section, although depriving a plaintiff of his costs, relieve him at the same time from liability to pay the defendant his costs. Thus he may be liable to pay the costs of issues upon which the defendant has succeeded, although he has been deprived by the County Courts Acts of his right to be paid any costs by the defendant, even the costs of those issues upon which he has succeeded.

The section further provides that the plaintiff shall not be entitled to *any* costs of suit unless the judge certifies, and at first sight this would seem to deprive him of costs altogether; but it has been held^d that costs of execution are not costs of suit, and that a plaintiff who has recovered less than £20 in an action for breach of contract is entitled to levy the costs of an execution under the Common Law Procedure Act, 1852.^e

s. 5 applies
to action
removed
into Super-
ior Court;

The section also applies to an action commenced in an inferior court and removed into a superior court by certiorari on the application of the defendant. Thus where an action of detinue commenced by a plaintiff in the Mayor's Court London, was, at the instance of the defendant, removed by certiorari into the Queen's Bench, where the plaintiff recovered £3, it was held, the judge who tried the cause having refused to certify, under section 5, to give the plaintiff his costs, that he was not entitled to them. But it was remarked by *Blackburn J.*, that "no doubt the fact that a case has been removed into the Superior Court by the defendant might, in many cases, be a strong reason for allowing the plaintiff his costs."^f

^a *Baylis v. Lintott*, L.R. 8 C.P. 345 : 42 L.J. C.P. 119.

^b See remarks of Pollock CB., in *Sharland v. Loaring*, 1 Ex. at p. 381, 17 L.J. Ex. 32 as to effect of 3 & 4 Vic. c. 24.

^c *Blake v. Appleyard*, 3 Ex. D. 195 : 47 L.J. Ex. 407.

^d *Armitage v. Jessop*, L.R. 2 C.P. 12 : 36 L.J. C.P. 63 ; *Forshaw v. De Wette*, L.R. 6 Ex. 200 : 40 L.J. Ex. 153.

^e 15 & 16 Vic. c. 76, s. 123 ; and see Order 42, r. 15, which in terms is precisely the same as s. 123.

^f *Pellas v. Breslauer*, L.R. 6 Q.B. 438, 440 : 40 L.J. Q.B. 161 ; *Flitters v. Allfrey*, L.R. 10 C.P. 29 : 44 L.J. C.P. 73.

If a plaintiff suing in *forma pauperis* recovers less than the amounts fixed by section 5, he would not be entitled to any costs without an order.^a

also to action by pauper plaintiff;

Where an action has been referred by consent to arbitration upon the terms that the costs of the action shall abide the event, and the award is for the plaintiff for less than £20 in an action founded upon contract, the plaintiff is deprived of his costs by section 5 of the County Courts Act, 1867, unless he has obtained an order or certificate under the section.^b

also to action referred on terms "costs to abide event."

The rule in a case of this kind is that whenever the plaintiff is entitled to judgment in the action, and gets his damages in the action, and the case is such that, if there had been no reference, the plaintiff would by virtue of the County Courts Act have lost his costs in the cause, so does he equally lose them when there is a reference which fixes the amount, unless he has succeeded in getting the necessary certificate.^c

But where an action is referred on the terms that the costs of the cause shall abide the event, but the costs of the reference and award shall be in the discretion of the arbitrator, if the arbitrator decides in favour of the plaintiff, he may lawfully direct the defendant to pay the costs of the reference and award, although the plaintiff may be deprived of the costs of the cause under section 5 of the County Courts Act, 1867.^d

Section 9 of the County Courts Admiralty Jurisdiction Act, 1868,^e which enacts that persons taking proceedings in the Superior Court which they might under section 3 of that Act have taken in a County Court, shall not be entitled to costs, unless the judge before whom the cause was tried shall certify that it was a proper cause to be tried in a superior court is inconsistent with and repealed by the rules of the Superior Court as to costs.^f

s. 9 of 31 & 32 Vic. c. 71 repealed.

It is often difficult to determine whether an action is founded

Test as to whether action

^a As to this see *Chinn v. Bullen*, 8 C.B. 447 : 19 L.J. C.P. 42.

^b *Fergusson v. Davison*, 51 L.J. Q.B. 266 ; 8 Q. B.D. 470, over-ruling *Jones v. Jones*, 7 C.B. N.S. 832 ; 29 L.J. C.P. 151.

^c *Smith v. Edge*, 2 H. & C. 659 : 33 L.J. Ex. 9 ; *Cowell v. The Amman Colliery Co.*, 6 B. & S. 333 : 34 L.J. Q.B. 161.

^d *Gallatti v. Wakefield*, 4 Ex. D. 249 : 48 L.J. Ex. 70 ; *Forshaw v. De Wette*, L.R. 6 Ex. 200 : 40 L.J. Ex. 153 ; and see *Moore v. Watson*, L.R. 2 C.P. 314 : 36 L.J. C.P. 122, which turned upon the right of the plaintiff to the costs of the reference, and did not touch the question of his right to the costs of the cause.

^e 31 & 32 Vic. c. 71.

^f *Tenant v. Ellis*, 6 Q.B. D. 46 ; 50 L.J. Q.B. 143 ; although this case was decided upon the words of the annulled Order 55 R.S.C. 1875, it is still a binding decision.

nded on
contract or
tort. on contract or tort, and this question has been recently considered in three cases.^a

In order to determine whether an action is founded on contract or founded in tort, it is necessary to look at the substance of the action, and not at the form. If the foundation of the action is the breach of a contract, then the action is "founded on contract;" but where the cause of action is a wrongful act or the breach of a duty ultra a contract, then the action is "founded on tort."^b Thus where in an action claiming the return of a picture and damages for its detention, the plaintiff recovered a verdict of £10, being its value as assessed by the jury, and 1s. damages for its detention, it was held that the plaintiff was entitled to his costs since the action was "founded on tort" within the meaning of the County Courts Act, 1867, section 5.^c "The question then is," said *Brett L.J.* in delivering judgment, "whether the cause of action in fact here is a cause of action founded on contract in the sense of its being a breach of contract, or whether it is founded on tort in the sense of its being founded on a wrongful act. I certainly have come to a very clear conclusion that where persons are sued in detinue for holding goods to which another person is entitled, the real cause of action, in fact, is a wrongful act, and not a breach of contract, because it may arise and occur when there is no contract, and the remedy sought is not a remedy which arises upon a breach of contract. The real substantial cause of action is a wrongful act, and I am not prepared to say that the statute did not mean when it used the words 'founded on contract' or 'founded on tort,' founded on breach of contract as distinguished from founded on a wrongful act. If so, the action is founded on a wrongful act, and, therefore, within the meaning of the statute is founded on tort."^d This case decides that an action of detinue, which was formerly considered to be founded on contract, is for the purposes of this section founded on tort.^e

In *Pontifex v. Midland R. Co.*^f the plaintiff agreed to sell

^a *Bryant v. Herbert*, 3 C.P. D., 189, 389: 47 L.J. C.P. 354; in C.A. 670; *Pontifex v. Midland R. Co.* 39 Q.B. D. 23: 47 L.J. Q.B. 28; *Fleming v. Manchester & Sh. R. Co.* 4 Q.B. D. 81.

^b Remarks of *Bramwell L.J.* at p. 391 *et passim* in *Bryant v. Herbert*, *supra*; see also *Legge v. Tucker*, 1 H. & N. 500: 26 L.J. Ex. 71; *Baylis v. Lintott*, L.R. 8 C.P. 345: 42 L.J. C.P. 119; *Marshall v. York &c. R. Co.* 11 C.B. 655: 21 L.J. C.P. 34.

^c *Bryant v. Herbert supra*.

^d *Bryant v. Herbert supra*, *per Brett L.J.* at p. 392.

^e As to old law on subject see *Danby v. Lamb*, 11 C.B. N.S. 423: 31 L.J. C.P. 17.

^f 3 Q.B. D. 23: 47 L.J. Q.B. 28.

certain goods to A, and delivered them to the defendants as carriers consigned to A. The goods, A having become insolvent, were stopped in transitu by the plaintiff, who gave the defendants notice to hold them to his order. The defendants, notwithstanding this notice, delivered them to A, and it was held that the plaintiff's claim was founded, not on any existing contract between him and the defendants, but on the wrongful act of the defendants in delivering the goods as they did, after the contract to carry was put an end to by an unusual and unexpected event, viz., the stopping in transitu. "It appears to us," said *Cockburn C.J.*, in delivering the judgment of the Court, "that the words 'founded on contract' mean directly founded on contract, and not remotely, as in the present case. In reality, what the defendants did was to perform the original contract of carrying, which they had no right to do after the stopping in transitu."^a In this case the plaintiff claimed £12 16s. 6d. The defendants paid that sum into court, and the plaintiff took it out in satisfaction, and it was held that he was entitled to recover his costs.

In a subsequent case the claim alleged that goods were delivered to defendants as carriers of goods for hire, and that they did not safely and securely carry and deliver the same, but so carelessly conducted themselves that the goods were lost. The defendants paid into Court £12 3s. 4d., which the plaintiffs accepted in satisfaction of their claim, and it was held that the action was "founded on contract" within the meaning of the County Courts Act, 1867, section 5, and that consequently the plaintiffs were not entitled to costs. "By paying money into Court unconditionally," said *Bramwell L.J.*, "the defendants have admitted the truth of the allegations set forth in the statement of claim."^b These allegations seem in effect to amount to a charge that, in consideration of the payment of hire, the defendants promised to carry safely the plaintiffs' goods; and this would clearly have been under the old forms of pleading a declaration in contract."^c The ground of distinction between this case and that of *Pontifex v. Midland R. Co.*^d is that in the latter case the defendants wrongfully dealt with the goods after the contract to carry had been determined, whereas in the former case the real ground of complaint was the breach of the contract to deliver.

Following then the rule laid down in these cases as the test,

^a *Per Cockburn C.J. id.* at p. 27.

^b *See* R.S.C. 1883, Order 22, r. 1, as to effect of payment into Court.

^c *Fleming v. Manchester & Sh. R. Co.* 4 Q.B. D. 81 at p. 83.

^d 3 Q.B. D. 23 : 47 L.J. Q.B. 28.

"Relief
sought :"
explan-
ation of
term.

it will not be difficult to determine in the majority of cases whether an action is "founded on contract," or "founded on tort," or "founded on a breach of duty *ultra* a contract."^a

The next question which arises is as to the operation of section 5 upon those cases in which a plaintiff in an action in the Superior Court establishes an original claim to an amount (1) exceeding and (2) not exceeding that over which the County Court has jurisdiction (*viz.* £50), but which, by set-off, payment, or counterclaim, is now reduced to a sum less than £20 in contract or £10 in tort, as has been already pointed out.^b Section 5 of the County Courts Act, 1867, is confined in its operation by section 67 of the Judicature Act, 1873, to those cases in which the relief sought is relief which can be given by the County Courts; and it has also been shown that the County Courts have no jurisdiction in any action where the claim indorsed on the writ exceeds £50. But for the purposes of section 5 it has been held that the *sum recovered* is to be the test as to whether the section is to apply or not, and that the sum for which the plaintiff is entitled to sign judgment is the "*sum recovered*" within the meaning of the section, and that it is immaterial how the original claim has been reduced to that sum, whether by proof of payment, set-off, or otherwise.^c

Under section 7 of the County Courts Act, 1867, the County Courts have jurisdiction to try (when an order to that effect has been made by a judge of the Superior Court) any action of contract brought or commenced in the Superior Courts where "the claim endorsed on the writ does not exceed £50, or where such claim, though it originally exceeded £50, is reduced by payment, set-off, or otherwise, to a sum not exceeding £50." It has been decided that this section does not apply to cases where the sum claimed is reduced to a sum not exceeding £50 by payment made after action brought;^d nor does it give a County Court jurisdiction to try the action where the amount claimed has been reduced by payment into Court

^a See cases collected on this subject in Pitt Lewis' County Court Practice, pp. 135-139.

^b *Ante* pp. 21 *et seq.*

^c *Per Hawkins J.*, *Neale v. Clarke*, 4 Ex. D. 286; *Ashcroft v. Foulkes*, 18 C.B. 261; 25 L.J. C.P. 202; *Osborne v. Homburg*, 1 Ex. D. 48; 45 L.J. Ex. 65; *Foster v. Usherwood*, 3 Ex. D. 1; 47 L.J. Ex. 30; as to payment into Court *see Hewitt v. Cory*, L.R. 5 Q.B. 418; 39 L.J. Q.B. 279; *Parr v. Lillicrap*, 1 H. & C. 615; 31 L.J. Ex. 150; *Boulding v. Tyler*, 3 B. & S. 472; 32 L.J. Q.B. 85.

^d *Osborne v. Homburg*, 1 Ex. D. 48; 45 L.J. Ex. 65; as to payment before action *see Turner v. Berry*, 5 Ex. 858; 20 L.J. Ex. 89; *Hudspeth v. Yarnold*, 19 L.J. C.P. 321.

after action brought.^a So also in a case which arose under section 24 of the County Courts Act, 1856,^b by which jurisdiction was given to a County Court to try actions where "the debt or demand claimed consists of a balance not exceeding £50 after an admitted set-off of any debt or demand claimed or recoverable by the defendants from the plaintiff," it was held that an admitted set-off meant a set-off admitted before action brought.^c

"Relief sought:"
"explanation of term."

So where a writ was endorsed for £50, and interest thereon until payment or judgment, it was held that the claim was for a sum exceeding £50, and consequently that the County Court had no jurisdiction to try the action.^d

A defendant in any action can now set off or set up by way of counterclaim (*i.e.*, it is submitted, as distinguished from a set-off in the strict sense of the term) against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce final judgment in the same action, both on the original and on the cross claim.^e Moreover, where such set-off or counterclaim is established as a defence against the plaintiff's claim, the Court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudicate the defendant such relief as he may be entitled to upon the merits of the case.^f

It may happen that the practical effect of the permission to set up a counterclaim will be that a plaintiff may have the sum which he establishes on his claim reduced by such counterclaim to a sum less than £20 in contract, or £10 in tort, and then arises the question, will he be deprived of his costs under the County Courts Act, 1867, sec. 5?

It is to be borne in mind that the following remarks are based upon the assumption that a distinction exists between a "set-off" in the strict sense of the term, and a "set-off or counterclaim" under the Judicature Acts.

^a *Foster v. Usherwood*, 3 Ex. D. 1 : 47 L.J. Ex. 30; *Crosse v. Seaman*, 10 C.B. 884; 20 L.J. C.P. 177; *Cooch v. Maltby*, 23 L.J. Q.B. 305; *James v. Vane*, 29 L.J. Q.B. 169.

^b 18 & 19 Vic. c. 108.

^c *Walesby v. Goulstone*, L.R. 1 C.P. 567 : 35 L.J. C.P. 302; as to disputed set-off *see* *Beard v. Perry*, 2 B. & S. 493 : 31 L.J. Q.B. 180; *Tonge v. Chadwick*, 5 E. & B. 950 : 25 L.J. Q.B. 128; *Woodhams v. Newman*, 7 C.B. 654 : 18 L.J. C.P. 213; as to payment on account *see* *Avard v. Rhodes*, 8 Ex. 312 : 22 L.J. Ex. 106; *Balmain v. Lickfold*, 44 L.J. C.P. 94.

^d *Insley v. Jones*, 4 Ex. D. 16 : 48 L.J. Ex. 222.

^e Order 19, r. 3.

^f Order 21, r. 17.

'Relief
ought to be
granted :"
explanation
of
this.

The question may arise in the following manner, viz :

(1.) The plaintiff may recover on his original claim a sum exceeding £50, which, however, is reduced *either* by a set-off proper, *or* by a counterclaim, to less than £20 in contract, or £10 in tort ; or

(2.) He may recover, on his original claim, a sum not exceeding £50, which is reduced either by a set-off proper or by counterclaim to less than £20 in contract, or £10 in tort.

As regards the case where the plaintiff recovers a sum exceeding £50, which is reduced by a counterclaim below £20 in contract, or £10 in tort, it has been held that there the plaintiff is not deprived of his costs under section 5.^a In the case referred to, the plaintiffs brought an action for a sum of £114 8s., which the defendant denied that he owed to them, and set up a counterclaim for £109 16s. Both parties succeeded in establishing their respective claims, and a balance was left in favour of the plaintiffs for £4 12s. only, and no order as to costs having been made, it was held that the plaintiffs were entitled to their costs, because they had recovered in the action a sum exceeding that over which the County Court had jurisdiction. In other words, the relief sought by the plaintiffs was not relief which could have been given by a County Court within the meaning of the Judicature Act, 1873, sec. 67,^b and consequently the plaintiffs were entitled to bring the action in the Superior Court. The same rule would seem to apply even when the counterclaim is larger than the claim, so that the balance for which judgment may be signed is in favour of the defendant.^c So that although the plaintiff might not be entitled to the costs of the action, inasmuch as judgment would be given for the defendant under Order 21, r. 17, for the balance found in his favour, yet the plaintiff would not be wholly deprived of his costs by virtue of sec. 5, but would be entitled to the costs of those issues upon which he had succeeded.

The principle already referred to was laid down and approved of in a subsequent case,^d where the action was referred to arbitration.

There the plaintiff brought an action to recover £1,029 15s. 6d., admitting that that sum was reduced by payment to £280 12s. Particulars of the claim were delivered, claiming the sum of £1,029 15s. 6d., but giving no credit either for payment or set-

^a Potter v. Chambers, 4 C.P. D. 69, 457 : 48 L.J. C.P. 274.

^b *Id.* ; see also Cole v. Firth, 4 Ex. D. 301 (n) : 40 L.T. N.S. 851.

^c Neale v. Clarke, 4 Ex. D. 286, at p. 300, *per Hawkins J.* referring to Cole v. Firth, *supra*.

^d Neale v. Clarke, *supra*.

off. The defendants, who were the executors of one Clarke, deceased, by their defence denied the plaintiffs' claim to £1,029 15s. 6d., or any part thereof, and claimed payment and set-off for money advanced, money had and received, work and labour, goods sold and delivered, and also claimed a balance of £200 to be due to them on the whole account. The case was referred, "costs of the cause to abide the event," and the arbitrator found that the defendants were indebted to the plaintiffs to the extent of £1,067 os. 6d., and the plaintiffs to the defendants in the sum of £1,055 10s. 3d., and that the defendants were entitled to set off this sum against the plaintiffs' amount, thus leaving a balance of £11 10s. 3d. due from the defendants to the plaintiffs. Under these circumstances *Kelly CB.* was of opinion that the plaintiffs were not deprived of their costs under sec. 5 of the County Courts Act, 1867, because the relief sought (being for an amount exceeding £50) was relief which could not have been given by the County Court. "If the action," said his Lordship, "had been brought in the County Court, that Court must, at the outset of the trial, have received evidence upon the question whether the plaintiffs, independently of the set-off and counterclaim, could establish a demand of £1,029 15s. 6d., or to the sum to which they had reduced their claim, viz., £280 12s. This the County Court had no jurisdiction to do. It became indispensable that this should be ascertained in the first instance, because the defendants had expressly pleaded, and it was the first issue joined in the cause, that no such sum as £1,029 15s. 6d. was due to the plaintiffs. And if that were so, as it undoubtedly was, whatever in the course of the trial might have been proved as to payment, set-off, or counterclaim on the part of the defendants, the Court could not enter upon those questions until the first issue thus joined and arising should be determined; so the case came expressly within the words of sec. 67 of the Judicature Act, 1873, that the relief sought by the plaintiffs can be given in the County Court." ^a And again, "no case has been cited or exists in which the demand in the writ and in the statement of claim is of a larger amount than £50, and the defendant denies that that sum is due, and issue is joined thereon, so that the Court must proceed to try the question whether such larger sum is due or not, in which it has been held that the County Court has jurisdiction, and consequently that relief could be given in the County Court." ^b

In the opinion of *Hawkins J.*, however, "the relief sought may most reasonably be interpreted to mean that amount or

"Relief sought :"
explanation of term.

^a *Id. per Kelly CB.* at p. 287.

^b *Id.* at p. 290.

Relief
sought :"
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balance which is really due to the plaintiff, and which he is entitled to sue for and recover without foregoing any portion of his just demand,"^a and after fully discussing the difference between cases of strict set-off of mutual debts under 2 Geo. ii. c. 22, and cases where the plaintiff's claim (established to an extent exceeding £50) is reduced by a counterclaim below £20 in contract, or £10 in tort, his Lordship was of opinion that the set-off or counterclaim in the case then before him was a set-off in the strict sense of the term, and consequently that the plaintiffs, if they had thought fit, might have brought their action in the County Court. In other words, the relief sought by the plaintiffs was relief which could have been given in a County Court.

This case is only cited to explain the meaning of the words "relief sought," as it would seem to be impeachable as an authority, if not in fact overruled, by *Chatfield v. Sedgwick*^b on the other point, as to whether, if an action is referred to arbitration, "costs to abide the event," and the event is less than £20 in contract, or £10 in tort, the plaintiff is entitled to his costs.

As to the next point, where a plaintiff recovers a sum exceeding £50, which is reduced by set-off proper to or below £20 in contract, or £10, there would seem to be some difference of opinion as to whether the plaintiff is deprived of his costs or not under sec. 5. The case of *Neale v. Clarke*^c shows that *Kelly CB.* was of opinion that the plaintiffs were entitled to their costs, because they had first to establish their right to relief which the County Court cannot give, viz., to a sum exceeding £50; but on the other hand, *Hawkins J.* was of opinion that the set-off being a set-off proper, within the meaning of the statutes of set-off, the plaintiffs were not entitled to their costs, because the relief sought was relief which might have been given in a County Court if they had taken the proper steps to obtain it.^d

Next as to the case where the plaintiff recovers a sum not exceeding £50, which is reduced by set-off, proof of payment or otherwise, to a sum less than £20 in contract or £10 in tort. Here it would seem that a plaintiff would not be entitled to his costs, because the relief sought, as measured by the sum recovered (being under £50), is relief which can be given in the County Court, within the meaning of section 67 of the Judicature Act, 1873, and consequently section 5 would apply.^e

^a *Id.* at p. 295.

^b 4 C.P. D. at p. 459.

^c 4 Ex. D. 286.

^d *Id.* at pp. 298 *et seq.*

^e *Neale v. Clarke*, *supra*, *per Kelly CB. & Hawkins J.*; and see *Ashcroft v. Foulkes*, 18 C.B. 261 : 25 L.J. C.P. 202; *Turner v. Berry*, 5 Ex. 858 : 20 L.J. Ex. 89.

Lastly, where the plaintiff recovers a sum not exceeding £50, which is reduced by a counterclaim to less than £20 in contract or £10 in tort, it would seem, on the authority of the remarks of *Cockburn C.J.* in *Stooke v. Taylor*,^a that the plaintiff would be entitled to his costs. On the other hand, *Staples v. Young*^b is an authority to the contrary, and decides that the plaintiff's right to costs depends upon the balance, and if no certificate under section 5 has been given, he will not be entitled to costs if the balance is less than the amounts fixed by the section. As regards this last-mentioned case, it must be observed that the distinction between set-off and counterclaim does not there seem to have been so fully entered into as it has been in subsequent cases.

It is, moreover, now provided that in actions founded on contract, in which the plaintiff recovers by judgment or otherwise, a sum (exclusive of costs) not exceeding £50, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the Court or a judge otherwise orders (Order 65, r. 12).^c

The judge who tried the action is the proper person to certify under section 5, although an original jurisdiction is given to the Court or a judge at chambers to allow a plaintiff his costs. The Court, however, will not interfere with the discretion of the judge where it is not satisfied that such discretion has been wrongly exercised, as for instance where he refused to certify for costs under the section because he thought that the action was not *bond fide* brought to try a right, but merely to gratify an angry feeling against the defendant.^d The Court not only *may*, but *ought* to review the discretion of the judge if satisfied that he has exercised it erroneously.^e But a judge is justified in declining to certify for costs if he is reasonably satisfied that the action should not have been brought at all.^f Formerly, where an action was sent to the County Court for trial under 19 & 20 Vic. c. 108, s. 26, the County Court judge had power to certify on the record so as to entitle the plaintiff to costs, that there was sufficient reason for bringing the action in the Superior Court, and the issue sent with the judge's order was a

^a 5 Q.B. D. 569 : 49 L.J. Q.B. 857.

^b 2 Ex. D. 324. See *ante* chap. 2.

^c For County Court Scale of Costs see Appendix, part 2, *post*.

^d *Strachey v. Lord Osborne*, L.R. 10 C.P. 92, 95, *per Coleridge C.J.* : 44 L.J. C.P. 6.

^e *Hinde v. Sheppard*, L.R. 7 Ex. 21 : 41 L.J. Ex. 25.

^f *Strachey v. Lord Osborne*, *supra*.

sufficient record for that purpose;^a so also an undersheriff had power to certify for costs on the writ of inquiry.^b The registrar however, has no power to certify for the costs.^c

Costs
where
action
ordered to
be tried in
County
Court.

But it is now provided that, where an action is ordered to be tried under the provisions of 19 & 20 Vic. c. 108, s. 26, *the costs of the action shall*, subject to the provisions of the principal Act and the Rules of Court, *follow the event*, unless by the registrar's certificate of the result of the trial it shall appear that the judge before whom the action was tried was of opinion that the question of costs ought to be referred to a judge of the High Court, in which case no costs shall be recovered unless ordered by the Court or a judge (Order 65, r. 4).

Costs of
remitted
action.

Where an action has been remitted for trial to the County Court under 30 & 31 Vic. c. 142, s. 10, the Court in which the action was originally brought has no jurisdiction at all over the costs, and therefore cannot make an order to tax.^d The County Court judge in such a case has full jurisdiction over the costs.

It has not been thought necessary to consider in detail in this work the numerous cases which have been decided as to when a plaintiff is entitled to a certificate for costs under section 5, because, it is submitted, that in the greater number of cases where a plaintiff recovers less than the statutory amounts, any application made as to costs would be disposed of by the judge exercising the general discretion given to him by Order 65, and not under the County Courts Act, 1867, s. 5. The cases are, however, useful as showing what principles have been followed in allowing or refusing a certificate under the section, and are, for that reason, inserted below.^e

Summary.

The effect of the decisions as to the meaning of the words "relief sought" may, it is suggested, be summarized in the following manner:—

1. Where a plaintiff recovers a sum exceeding £50, which is reduced by a counterclaim to a sum less than £20, in an action founded on contract, or £10 if founded on tort, he will not be

^a Taylor v. Cass, L.R. 4 C.P. 614.

^b Craven v. Smith, L.R. 4 Ex. 146; 38 L.J. Ex. 90.

^c Farmer v. May, 50 L.J. Q.B. 295.

^d Moody v. Stewart, L.R. 6 Ex. 35; 40 L.J. Ex. 25.

^e Hatch v. Lewis, 7 H. & N. 367; 31 L.J. Ex. 26; Holborow v. Jones, L.R. 4 C.P. 14; 38 L.J. C.P. 22; Barlow v. Briggs, 27 L.T. N.S. 159; 20 W.R. 866 (Ex.); Sampson v. Mackay, 10 B. & S. 694; L.R. 4 Q.B. 643; Moody v. Stewart, L.R. 6 Ex. 35; 40 L.J. Ex. 25; Pellas v. Breslau, L.R. 6 Q.B. 438; 40 L.J. Q.B. 161; Hinde v. Sheppard, L.R. 7 Ex. 21; 41 L.J. Ex. 25; Gray v. West L.R. 4 Q.B. 175; 38 L.J. Q.B. 78.

deprived of his costs under section 5 of the County Courts' Act, 1867.^a

2. Where a plaintiff recovers a sum exceeding £50, which is reduced by a set-off, in the strict sense of the term, to a sum less than the above-mentioned statutory sums, he will be entitled to the costs of the issues upon which he has succeeded, because the relief sought, being for a sum exceeding £50, could not have been given in a County Court.^b But *Hawkins J.* in the case referred to expressed an opinion that where the set-off is a set-off proper within the meaning of the statutes of set-off, a plaintiff is not entitled to his costs, because the relief sought would be relief which might have been given in a County Court if the plaintiff had taken the proper steps to obtain it there.^c

3. Where the plaintiff recovers on his claim a sum exceeding £50, but the defendant recovers on his counterclaim, as distinguished from set-off, a sum exceeding that recovered by the plaintiff, it would seem that the plaintiff would not be deprived of his costs under section 5 of the County Courts Act, 1867.^d

4. Where the plaintiff recovers a sum not exceeding £50, which is reduced by a counterclaim to a sum less than the above-mentioned statutory amounts, it would seem that he would not be deprived of his costs under section 5.^e

5. Where the plaintiff recovers a sum not exceeding £50, which is reduced by a set-off under the Statute of Geo. ii., proof of payment, or otherwise, below the above-mentioned statutory amounts, it would seem that he is not entitled to any costs without a certificate or order, because the relief sought, as measured by the sum recovered, viz., a sum less than £50, would be relief which could be given in a County Court within the meaning of section 67 of the Judicature Act, 1873, and consequently section 5 of the County Courts Act, 1867, would apply.^f

6. The County Courts Act, 1867, s. 5, only affects a plaintiff's

^a *Potter v. Chambers*, 4 C.P. D. 69, 457; 48 L.J. C.P. 274; *Neale v. Clarke*, 4 Ex. D. 286.

^b *Neale v. Clarke*, *supra*; and see *Cole v. Firth*, 4 Ex. D. 301 (n.); also 40 L.T. N.S. 851, where the case is fully reported.

^c *Neale v. Clarke*, *supra*, at p. 298.

^d *Neale v. Clarke*, *supra*, at pp. 299, 300; *Cole v. Firth*, *supra*; *Potter v. Chambers*, *supra*.

^e *Stooke v. Taylor*, 5 Q.B. D. 569, at pp. 578, 579; *per Cockburn C.J.*: 49 L.J. Q.B. 857.

^f *Neale v. Clarke*, *supra*; see judgments of Kelly C.B. and Hawkins J. *passim*; but see *Stooke v. Taylor*, *supra*.

right to costs, and does not apply to a counterclaim. If, therefore, a defendant recovers on his counterclaim less than amounts specified in section 5, he will not be deprived of costs.^a

^a Blake *v.* Appleyard, 3 Ex. D. 195 : 47 L.J. Ex. 407.

CHAPTER IV.

COSTS IN PARTICULAR ACTIONS.

EXECUTORS AND ADMINISTRATORS.

AN executor or administrator is, when suing as a plaintiff, in the same position as an ordinary plaintiff with regard to his right to receive or liability to pay costs. But in the latter case the Court or a judge would probably relieve him if he had been misled by some misconduct on the part of the defendant.^a

Costs where plaintiff sues as executor, &c.

If, therefore, an executor or administrator who sues as a plaintiff, obtains judgment, he is entitled to costs as in an ordinary action; so also if he is successful when defendant in an action. If he is unsuccessful, he is liable as to costs *de bonis propriis* if there are no assets.

Where defendant is sued as executor, &c.

But as under the earlier practice an executor was not liable for costs where he pleaded in a particular way, it is proposed to briefly notice the cases on the subject. Thus, if an executor or administrator has no assets, he ought to plead *plene administravit*; otherwise it will be taken to be admitted by him that there are assets, and eventually he may become personally liable for the debt, damages and costs, if they cannot be levied on the goods of the deceased.^b The successful plaintiff in an action against an executor is entitled to judgment for his costs, to be levied on the goods of the deceased if any, and if not, then on the goods of the defendant.

Effect of plea of *plene administravit*.

If an executor or administrator pleads a defence which to his own knowledge is false; as, for instance, a release to *himself*, he will be personally liable to pay the costs if the debt, damages and costs cannot be levied on the goods of the deceased.^c

An executor or administrator who is successful on the plea of *plene administravit* is entitled to the general costs of the cause, although unsuccessful on the other issues, if any.^d

The plaintiff is entitled to take judgment on the plea of

Costs on judgment

^a 2 Williams on Executors, 1905, and cases cited *n. (g.)*

^b 2 Williams on Executors, 1989 *et seq.*

^c Marshall *v.* Willder, 9 B. & C. 655, 658.

^d Edwards *v.* Bethel, 1 B. & Ald. 254; Marshall *v.* Willder, 9 B. & C. 655.

for defendant on plea of plene administravit. plene administravit for his debt and costs of future assets quando acciderint.^a

Costs on judgment on plea for plaintiff. If the plaintiff joins issue on this plea, he is entitled if successful to judgment to the extent of assets proved against the defendant, and also of future assets quando acciderint. But if he fails to prove any assets, it is doubtful whether he can take judgment of future assets quando acciderint.

Where the defendant pleaded a plea of plene administravit and also non assumpsit, the defendant, if he failed, was liable for the costs, to be levied de bonis propriis if there were not assets of the testator sufficient to satisfy them.^b

Where the defendant pleaded a plea of plene administravit præter, or that he had administered all the personal estate and effects which were of the deceased, and which had ever come to his hands, the plaintiff might take judgment of assets which were admitted in part, and for the residue of the assets quando acciderint. In this case the defendant would not be liable to costs de bonis propriis.

Execution on judgment of assets in futuro. Where a party is entitled to execution upon a judgment of assets in futuro, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action

Costs. may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just (Order 42, r. 23).

INFANTS.

Liability of next friend for costs of action. The next friend of an infant plaintiff is personally liable for the costs of an action; for he is considered to undertake the conduct of it at his own personal risk.^c It has been held that although the next friend is liable for costs he is not a party to the action.^d

A person who lends his name as next friend of an infant

^a Cox v. Peacock, 4 Dowl. 134 : 2 Scott, 125.

^b Marshall v. Willder, *supra*; Hindsley v. Russell, 12 East 232; as to costs on judgment of assets *quando acciderint* see Mara v. Quin, 6 T.R. 1; Smith v. Tateham, 2 Ex. 205 : 17 L.J. Ex. 198.

^c See James v. Hatfield, 1 Str. 548; Slaughter v. Talbott, Willes, 190; Evans v. Davis, 1 C. & J. 460; Newton v. The London & Brighton R. Co. 7 D. & L. 328 : Archb. Pr. 1019 (ed. 13).

^d Sinclair v. Sinclair, 13 M. & W. 640 : 14 L.J. Ex. 109; Melhuish v. Collier, 19 L.J. Q.B. 469.

plaintiff, and it appears upon the record, is *prima facie* liable to the payment of the solicitor's bill of costs, even though he does not further interfere in the action, nor is interested in the event.^a

But it seems that the next friend of an infant defendant is not in general liable for the costs of an action which he has unsuccessfully defended.^b

An infant is not required to give security for costs on the ground that the next friend is insolvent.^c

PUBLIC HEALTH ACT, 1875.

Action against Local Authorities, Members or Officers thereof.

Where an action is brought under the Public Health Act, 1875,^d s. 264, against any local authority, or any member thereof, or any officer of a local authority, or person acting in his aid, for anything done or intended to be done, or omitted to be done under the provisions of the Act, it must be commenced within six months next after the accruing of the cause of action, and not afterwards ; and not until the expiration of one month after notice of action in writing, in accordance with the provisions of the Act, has been served upon the defendant. The venue is local, as the action is to be tried in the county or place where the cause of action occurred and not elsewhere.

Action against local authority or any member thereof.

Notice of action necessary.

The person to whom the notice is given may tender amends to the plaintiff, his solicitor or agent, at any time within one month after the service of the notice ; and in case the tender is not accepted, he may plead it in bar.

Tender of amends.

If amends have not been thus tendered, or if they are insufficient, the defendant may by leave of the Court at any time before trial pay into Court under plea such sum of money as he may think proper.

Payment into Court where tender insufficient.

If upon issue joined, or upon any plea pleaded to the whole of the action, the jury find generally for the defendant, or if the plaintiff be nonsuited, or judgment be given for the defendant, then the defendant is entitled to full costs of suit.

Costs.

It may here be observed that where a statute says "full costs," the Master allows the ordinary costs as between party

"Full costs," meaning of

^a Hawkes v. Cottrell, 27 L.J. Ex. 369.

^b Archb. Pr. 1021 (ed. 13) citing Anderson v. Ward, Dyer, 104 ; Gardiner v. Holt, 2 Str. 217 ; Dow v. Clark, 1 C. & M. 360 : 2 Dowl. 302.

^c See *post*, chap. 7.

^d 38 & 39 Vic. c. 55.

and party.^a There is no distinction in law between costs and "full costs."^b

MUNICIPAL CORPORATIONS ACT, 1882.

No action to be brought after six months from date of cause of action.

Under the Municipal Corporations Act, 1882 (45 & 46 Vic. c. 50) any action or proceeding against any person, and this includes a body of persons corporate or unincorporate, for any act done in pursuance of the Act, or in respect of any alleged neglect or default in the execution of the Act, shall not lie or be instituted unless it is commenced within six months next after the act or thing is done or omitted ; or in case of a continuance of injury or damage within six months next after the ceasing thereof.^c

Tender of amends.

Where the action is for damages, tender of amends before the action was commenced may, in lieu of, or in addition to any other plea be pleaded.^d

Effect on plaintiff's costs of tender and payment into Court.

If the action is commenced after the tender, or is proceeded with after payment into Court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he is not to recover any costs incurred after the tender or payment, and the defendant is entitled to costs to be taxed as between solicitor and client, as from the time of the tender or payment. This provision does not affect costs on any injunction in the action.^e

Fund out of which defendant's costs to be paid.

The costs, charges, expenses, &c., so incurred, or any part thereof, where the defendant is the officer, agent, or servant of the Council, may, unless otherwise directed by the Court before which the proceedings are heard and determined, be paid out of the borough fund or borough rate.^f

As to person entitled to sue for fine for acting in corporate capacity when unqualified.

No action to recover a fine from any person for acting in a corporate office without having made the requisite declaration, or without being qualified, or after ceasing to be qualified, or after becoming disqualified, can be brought except by a burgess of the borough. The action will not lie unless the plaintiff has within fourteen days after the cause of action arose, served a notice in writing personally on the person liable to the fine of

^a Jamieson *v.* Trevelyan, 10 Ex. 748 : 24 L.J. Ex. 74.

^b Irwine *v.* Reddish, 5 B. & Ald. 796.

^c Sec. 226, sub.-sec. 1.

^d *Ibid.* sub.-sec. 2.

^e *Ibid.*

^f Sub.-sec. 3 ; as to payment out of borough fund or rates of costs of action for malicious prosecution against a chief constable under Municipal Corporations Act (5 & 6 Will. iv., c. 76), s. 82, *see* Queen *v.* Mayor of Exeter, 6 Q.B. D. 135.

his intention to bring the action, nor unless the action is commenced within three months after the cause of action arose.^a Notice of necessary.

The Court or a judge shall, on the application of the defendant, within fourteen days after he has been served with writ of summons in the action, require the plaintiff to give security for costs.^b Security for costs.

Unless judgment is given for the plaintiff, the defendant is entitled to costs, to be taxed as between solicitor and client.^c Taxation of costs.

A moiety of the fine recovered is, after payment of the costs of action, to be paid to the plaintiff.^d

A person guilty of a corrupt practice at a municipal election, is liable to the like actions, &c., as if the corrupt practice had been committed at a parliamentary election.^e Thus, under the Corrupt Practices Prevention Act, 1854, a defendant is liable to a penalty and full costs of suit for illegally giving refreshments to a voter on the days of nomination or polling.^f This provision applies to a municipal election.^g Action for penalty for corrupt practices.

MARRIED WOMEN.

Under Order 16, r. 16, married women may sue and be sued as provided by the Married Women's Property Act, 1882.^h A married woman is now capable of entering into and rendering herself liable in respect of, and to the extent of her separate property on any contract. She can sue or be sued either in contract or in tort, or otherwise in all respects as if she were a feme sole; and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceedings brought by or taken against her. Any damages or costs recovered by her in any such action or proceeding are to be her separate property; and any damages or costs recovered against her are to be paid out of her separate property, and not otherwise.ⁱ Married woman entitled to sue and defend as *feme sole*; when.

The wife after her marriage is to continue to be liable to the extent of her separate property, and she may be sued for all debts contracted, and all contracts entered into or wrongs committed by Extent of wife's liability.

^a Sec. 224, sub-sec. 1.

^b *Ibid.* sub-sec. 2.

^c *Ibid.* sub-sec. 3.

^d *Ibid.* sub-sec. 5.

^e Sec. 78.

^f 17 & 18 Vic. c. 102, s. 23.

^g *Hargreaves v. Simpson*, 4 Q.B. D. 403; 48 L.J. Q.B. 607.

^h 45 & 46 Vic. c. 75; see s. 12.

ⁱ Sec. 1, sub-sec. 2.

her before her marriage. All sums recovered against her in respect thereof or for any costs relating thereto are payable out of her separate property. And as between herself and her husband, unless there be any contract between them to the contrary, her separate property is to be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof.^a But the provisions of the Act are not to increase or diminish the liability of any woman married before the commencement of the Act for any such debt, contract, or wrong, except as to any separate property to which she may become entitled by virtue of the Act, and to which she would not have been entitled for her separate use under the Acts repealed or otherwise, if the principal Act had not been passed.^b

Husband and wife in certain cases may be jointly sued.

A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage, if the plaintiff in the action seeks to establish his claim, either wholly or in part against both of them. If in any such action, or in any action brought in respect of any such debt or liability against the husband alone it is not found that the husband is liable in respect of any property of his wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him. In any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered or any part thereof, the judgment to the extent of the amount for which the husband is liable, shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue (if any) of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.^c

Married woman suing or defending as executor, &c.

A married woman may sue or be sued either alone or jointly with any other person or persons, as executrix, administratrix, or trustee.^d

The legal personal representatives of a married woman are, in respect of her separate estate, to have the same rights and liabilities, and be subject to the same jurisdiction as she would be if she were living.^e This will enable them to sue or be sued, and to be liable for costs, as in ordinary actions, to the extent of the separate estate.

Security for costs.

A married woman who sues now without her husband will

^a Sec. 13.

^d Sec. 18.

^b *Ibid.*

^e Sec. 23.

^c Sec. 15.

not be required to give security for costs except in those cases in which an ordinary plaintiff would be called upon to do so.^a

ACTION OF MANDAMUS.

By Order 53, r. 1, the plaintiff in any action in which he claims a mandamus to command the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested, is to indorse such claim upon the writ of summons. Claim for Mandamus to be indorsed on writ.

In such a case the costs would be recoverable by either party, as in an ordinary action for the recovery of damages.^b

If judgment is given for the plaintiff, the Court or judge may, under r. 3, command the defendant either forthwith, or on the expiration of such time and upon such terms as may appear to the Court or a judge to be just, to perform the duty in question. The Court or a judge may also extend the time for the performance of the duty. Terms on which judgment given.

No writ of mandamus is now to be issued in an action, but the mandamus is to be by judgment or order, which is to have the same effect as a writ of mandamus formerly had (r. 4). No writ to be issued.

If a mandamus, granted in an action or otherwise, or a mandatory order, injunction, or judgment for the specific performance of any contract be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or judge, at the cost of the disobedient party, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount so ascertained, and costs (Order 42, r. 30). Effect of non-compliance with Mandamus or Injunction.

PROCEEDINGS BY OR AGAINST PAUPERS.

At common law, every poor person upon proof that he was unable to pay the costs of an action, was admitted to sue in *forma pauperis*, and was thereby exempted from payment of Admission of Pauper to sue or defend.

^a *Threlfall v. Wilson*, 8 P.D. 18; *Severance v. The Civil Service Supply Association, Lim.*, 48 L.T. N.S. 485; *see tit.*: security for costs; *Brown v. North*, 9 Q.B. D. 52; 51 L.J. Q.B. 365.

^b As to special provision to this effect in action of Mandamus *see* C. L. P. Act, 1854 (17 & 18 Vic. c. 125), s. 70.

any Court fees.^a This exemption was extended by statute^b to the non-payment of fees to counsel or attorney; and subsequently the statute^c which entitled a successful defendant to costs in certain actions, excepted cases in which the plaintiff sued in *formâ pauperis*.^d

Degree of Poverty. The degree of poverty which entitles a plaintiff to sue and a defendant now to defend in *formâ pauperis* is fixed by Order 16, r. 22, which provides that any person may be admitted in the manner heretofore accustomed to sue or defend as a pauper on proof that he is not worth £25, his wearing apparel and the subject-matter of the cause or matter only excepted.

Moreover, to entitle a person to sue or defend in *formâ pauperis*, he must also comply with the provisions of rules 23 and 24, which direct that "a person desirous of suing as a pauper shall lay a case before counsel for his opinion whether or not he has reasonable grounds for proceeding;" and that "no person shall be permitted to sue as a pauper unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party, or his solicitor, that the case contains a full and true statement of all the material facts to the best of his knowledge and belief, shall be produced before the Court or judge or proper officer to whom the application is made, and no fee shall be payable by a pauper to his counsel or solicitor."

No fees. Under these rules, therefore, a pauper is exempt from the payment of fees to counsel, of the charges of the solicitor for services rendered, and by rule 25 from all liability to any Court fee so long as he continues to sue or defend in the character of a pauper.

Assignment of Counsel or Solicitor to pauper. The Court or judge, under rule 26, may assign a counsel or solicitor, or both, to assist the pauper, and the counsel or solicitor so assigned is not at liberty to refuse his assistance unless he satisfies the Court or a judge that he has some good reason for refusing.

Person taking fee from pauper guilty of contempt. Moreover, any person who takes or agrees to take, or seeks to obtain any fee, profit or reward from a person who is suing or defending as a pauper, for the conduct of his business in the Court, will, under rule 27, be guilty of a contempt of Court; and by rule 28 any person suing or defending as a pauper, who gives or agrees to give any such fee, profit or reward, is to be forthwith dispaupered, and is not to be afterwards admitted again in the same cause to sue or defend as a pauper.

The order to proceed in *formâ pauperis* only takes effect from

^a Gray, 253; Marshall, 347; see *Hoare v. Coupland*, 19 L.J. Q.B. 150.

^b 11 Hen. vii. c. 12.

^c 23 Hen. viii. c. 15, s. 1.

^d *Ibid.* s. 2.

the date of the service on the opposite party, who is entitled to the costs of all proceedings incurred prior to the service.^a

Inasmuch as these rules seem only to deal with the terms on which a person is to be admitted to sue in *forma pauperis*, and contain provisions relating to the conduct of the suit, it would appear that some of the old practice as to the costs of such a suit would still apply. At all events, the rules of Court make no express provision, with the exception of r. 31, concerning the costs of a pauper suit.

Under the earlier practice, a pauper got no costs from the opposite party unless by order of the Court or a judge.^b It is now provided by Order 16, r. 31, that "costs ordered to be paid to a person admitted to sue or defend as a pauper shall, unless the Court or a judge otherwise order, be taxed as in other cases." Taxation of costs.

A pauper, with one exception to be mentioned shortly, was not liable after admission to pay any costs to the defendant.^c But with regard to the payment of costs by the opposite party, the pauper was not entitled to costs if he came within the provisions of sec. 5 of the County Courts Act, 1867 (30 & 31 Vic. c. 142), and recovered less than ^d £20 in contract or £10 in tort.^e He was, however, still liable for costs incurred in an action either before he was admitted as a pauper^f or after he had been dispaupered.^g The exemption from liability to pay costs extended to both interlocutory and final costs.^h The only case in which formerly a pauper had to pay costs was where he had omitted to proceed to trial pursuant to notice; and then he had to pay the costs of the day.ⁱ Costs as against pauper

A pauper could not, as a matter of right, amend his pleadings after demurrer thereto, without payment of costs.^j

The solicitor, under the old practice, could not charge for matters falling under the description of skill and advice, which included all necessary business, as, for instance, preparing the Pauper liable to Solicitor for disbursement necessary to carry on action.

^a *Fray v. Voules*, L.R. 3 Q.B. 214 : 9 B. & S. 60.

^b Reg. Gen. T. T. 1853, r. 28; before this rule a pauper was entitled to costs from the very commencement of the action. Archb. Pr. (ed. 13), p. 1071.

^c See 23 Hen. viii. c. 15, s. 2, now repealed by 42 & 43 Vic. c. 59, Sch. Rice v. Brown, 1 B. & P. 30; Blood v. Lee, 3 Wilson 24.

^d 45 & 46 Vic. c. 57, s. 4.

^e *Chinn v. Bullen*, 19 L.J. C.P. 42 : 8 C.B. 447.

^f *Casey v. Tomlin*, 8 M. & W. 189; *Doe d. Ellis v. Owen*, 9 M. & W. 455; 10 M. & W. 514 : 12 L.J. Ex. 53.

^g *Marshall*, 352.

^h *Pratt v. Delarne*, 10 M. & W. 509; 12 L.J. Ex. 25.

ⁱ See Reg. Gen. Hil. Term, 1853, r. 122; *Doe d. Linsey v. Edwards*, 2 Dowl. 468; *Tempany v. Rigby*, 10 Ex 476 : 24 L.J. Ex. 32.

^j *Fowler or Foster v. B. of England*, 14 L.J. Q.B. 178 : 6 Q.B. 878.

requisite documents; but he was entitled to be reimbursed money which he had necessarily expended for the pauper.^a Thus, it was held that he was entitled to charge for paper or parchment necessary for carrying on the suit; but that he was not entitled to recover a stationer's charge for copying.^b

Pauper recovers such expenses of witnesses as are actually paid.

Set-off of costs in pauper action.

Where a pauper is entitled to costs, he cannot recover the expenses of his witnesses which he has not actually paid. The rule on this subject which applies to ordinary applications being applicable to an action of this kind.

There can be no set-off of costs in favour of the other party either in the same or any subsequent action when the party who sues or defends as a pauper fails.^c

If the plaintiff was suing as a pauper and was nonsuited, the costs of the nonsuit could not be set off against the costs in a second action where he did not sue as a pauper.^d

Nor could a successful defendant set off his costs against the claim of a pauper for costs against an unsuccessful co-defendant.^e

But the costs could be set off in the case where he sued not as pauper in the first action, but as pauper in the second, if he recovered judgment with substantial damages.^f

Compromise to defeat Solicitor's lien

The Court set aside a release executed after action by a plaintiff suing in *formd pauperis*, the object of which was to deprive his solicitor of his costs.^g In that case the Court had ordered the solicitor to do the work, and as an inducement had said he should be paid if he had succeeded; but the release took away all chance of payment of his costs; for he could not recover any from his own client.^h

ACTIONS FOR THE RECOVERY OF LAND.

Ejectment before Judicature Acts.

Under the old practice, prior to the passing of the Judicature Acts, no other cause of action could be joined with ejectment; and there were many provisions made, especially under the Common Law Procedure Acts, relative to the procedure in this particular kind of action; but most of these are now obsolete. Such an action is now regulated by the Rules of Court, 1883,

^a Marshall, 349.

^b Holmes v. Penney, 9 Ex. 584 : 23 L.J. Ex. 132.

^c Marshall, 353; Foss v. Facine, 7 Dowl. 203.

^d Marshall, 354, citing Hoare v. Dickson, 18 L.J. C.P. 158; Haigh v. Paris, 4 D. & L. 325.

^e Gougenheim v. Lane, 1 M. & W. 136 : 4 Dowl. 482.

^f O'Hara v. Reeves, 18 L.J. Q.B. 231 : 13 Q.B. 659.

^g Wright v. Burroughes, 15 L.J. C.P. 277 : 3 C.B. 444.

^h Per Maule J. *supra*, at p. 277.

ⁱ C.L.P. Act, 1852, s. 41.

and is subject to the ordinary rules applicable to an action in the High Court, amongst others to those relating to costs. As, however, there seem to be one or two instances where the Rules of Court do not make any provision, it is proposed shortly to call attention to them as well as to one or two of the main provisions of the Rules of Court affecting this class of action and indirectly the question of costs.

Thus by Order 3, r. 6 (F), in actions for the recovery of land with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant, the writ of summons may *at the option of the plaintiff* be specially endorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled.^a

Specially indorsed writ in action of ejectment

It would, however, seem that where the plaintiff claims possession of the land only and nothing more, he would still be subject to the old rule, and get no costs where the defendant suffered judgment in default of appearance;^b and formerly these costs were recoverable in an action for mesne profits. It is, moreover, noticeable that the form of judgment in default of appearance given in Appendix F^c does not give the costs, whereas a number of the other forms of judgment contain the words "and costs to be taxed."

Costs on default of appearance where claim for land only.

Where, however, the plaintiff claims possession of land and also mesne profits or rent, and specially indorses the writ as directed by Order 3, r. 7, he would be entitled to costs in case the defendant made default in appearance.

Where several causes of action joined with claim for land.

Where the defendant has appeared to a writ of summons specially indorsed, the plaintiff can apply under Order 14, r. 1, for liberty to enter final judgment for recovery of the land, with or without rent or mesne profits, as the case may be, and costs. The judge will make the order unless the defendant by affidavit or otherwise satisfies him that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend. Moreover, if the defence applies to part only of the claim, an order will be made allowing the plaintiff to enter judgment for the residue. Thus, upon this application, the plaintiff might obtain judgment for the recovery of possession, and the defendant leave to defend as to the claim for mesne profits, &c.

Judgment under Order 14, where writ specially indorsed.

^a For special indorsements applicable to the case *see* Forms in Appendix (C) s. iv.

^b Gray 196, and C.L.P. Act, 1852, s. 177, which did not give the claimant any right to judgment for costs; *see* *Pearse v. Coaker*, L.R. 4 Ex. 92: 38 L.J. Ex. 82.

^c Form No. 3; also *see post*, Appendix part i.

Mesne profits, arrears of rent, &c.

**Judgment
by default
where
defendant
answers
part only of
claim.**

**Where
counter-
claim exe-
cution not
to issue
without
leave.
Execution.**

By r. 9, if the plaintiff's claim be for a debt or liquidated demand, the detention of goods and pecuniary damages, or for any of such matters, or *for the recovery of land*, and the defendant delivers a defence which purports to offer an answer to part of the plaintiff's alleged cause of action, the plaintiff may leave of the Court or a judge enter judgment, final or interlocutory, as the case may be for the part unanswered, provided that the unanswered part consists of a separate cause of action or is severable from the rest, as in the case of a debt or liquidated demand.

But where there is a counterclaim execution on any such judgment as above-mentioned in respect of the plaintiff's claim, it is not to issue without leave of the Court or a judge.

Upon any judgment or order for the recovery of land costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs at election of the successful party (Order 47, r. 3).

The special provisions made in respect of costs in the case of nonsuit of the plaintiff in ejectment,^b or of non-appearance of the plaintiff,^c or defendant,^d at the trial, and the like,^e have little application now, as such costs are practically provided for by the existing Rules of Court.

^a As to these rules *see tit.* : default of pleading, *post*, chap. 11.

^b See Reg. Gen. T.T. 1853, r. 29.

^c *Ibid.* r. 30.

^d Reg. Gen. H. T. 1853, r. 114.

* As to execution in general being joint or separate *see* C.L.P. Act, s. 187, and Order 42, rr. 18, 19.

There is, however, an enactment which may still be applicable in actions for the recovery of land, to the effect that all proceedings are to cease and be discontinued if the tenant or his assignee pays or tenders at any time before trial to the lessor or landlord, his executors or assignees, or his or their solicitor, or pays into Court all the rent and arrears, together with the costs.^a

Proceedings to cease, tenant paying all rent with costs.

Again, the plaintiff could be ordered to give security for costs where he brought a second action to recover possession of the same premises as those claimed unsuccessfully in the first.^b Also where the action was brought in substance to try the same title as had been contested in the first action, the proceedings were generally stayed until the costs of the former action had been paid.^c Nor is it necessary to entitle the defendant to have the second proceedings stayed that the parties should be precisely the same, or the premises sought to be recovered identical.^d The Court had also power to order a person at whose instance and for whose benefit an action of ejectment was brought, though not a claimant named in the writ, to pay costs to a successful defendant.^e

Security for costs in second action where costs of first action not paid.

And where the plaintiff succeeded in an action of ejectment in which there were several defendants, each of them, although defending for part of the premises claimed, was held to be liable for the whole of the plaintiff's costs.^f

Costs where several defendants.

The preceding sections and general rules which have been selected from amongst many others, may be useful as a guide where similar questions arise under the existing procedure.^g

INFRINGEMENT OF PATENT.

Under 15 & 16 Vic. c. 83, s. 43, in taxing the costs in any action for infringing letters-patent, regard is to be had to the particulars delivered in the action, and the plaintiff and defendant respectively, are not to be allowed any costs in respect of any particulars, Costs in action for infringing letters patent.

^a See C.L.P. Act, 1852, s. 212 ; see a somewhat similar provision in action by mortgagee to recover possession of land, s. 219.

^b C.L.P. Act, 1854, s. 93.

^c See *Tichborne v. Mostyn*, L.R. 8, C.P. 29 : 41 L.J. C.P. 113 ; *Keene v. Angel*, 6 T.R. 740 ; *Doe d. Langdon v. Langdon*, 5 B. & Ad. 864 ; *Cobbett v. Warner*, L.R. 2 Q.B. 108 : 36 L.J. Q.B. 94.

^d *Tichborne v. Mostyn*, *supra*.

^e *Mobbs v. Vandenbrande*, 33 L.J. Q.B. 177 : 4 B. & S. 904.

^f *Johnson v. Mills*, L.R. 3 C.P. 22 : 37 L.J. C.P. 57 ; C.L.P. Act, 1852, ss. 174, 205, 251.

^g For further information see Common Law Procedure Act, 1852, ss. 168 to 221 inclusive, C.L.P. Act, 1854, s. 93 ; C.L.P. Act, 1860, ss. 1, 2 ; as to mode of pleading see Order 21, r. 21.

- Proof of particulars to be certified by Judge.** unless the judge before whom the action is tried certifies that such particulars have been proved by the plaintiff or defendant respectively, without regard to the general costs of the cause. The judge before whom any such action is tried may certify the record that the validity of the letters-patent in the statement of claim mentioned came in question; and the record, with such certificate, being given in evidence in any suit or action for infringing the letters-patent, or in any proceeding by scire facias to repeal the letters-patent, will entitle the plaintiff in such suit or action or the defendant in the proceeding by scire facias on obtaining a decree, decretal order or final judgment to his full costs, charges and expenses, taxed as between solicitor and client, unless the judge making the decree or order, or the judge trying the action or proceeding, certifies that the plaintiff or defendant respectively ought not to have such full costs.
- Taxation of Costs.** This section only applies where the action has been tried.^b

JUSTICES OF THE PEACE.

- Limitation of action.** No action will lie against a justice of the peace for any act done by him in the execution of his office as such justice, unless commenced within six calendar months next after the act complained of shall have been committed, and one calendar month notice of action at least must be given.^c
- Notice of action.**
- Tender of amends.** The justice may, after such notice has been given, and before action commenced, tender amends to the plaintiff or to his solicitor or agent, for the injury complained of. After the action has been commenced, and at any time before issue joined, he may, if he has not made such tender, or in addition to the tender, pay such sum into Court as he may think fit. Such tender or payment into Court, or either of them, may afterwards be given in evidence by the defendant at the trial. If the jury are of opinion that the sum tendered and paid into Court is sufficient, the defendant is entitled to the verdict, and the plaintiff is not at liberty to elect to be nonsuited; and the sum of money, if any, so paid into Court, or so much thereof as shall be sufficient to pay or satisfy the defendant's costs, shall thereupon be paid out to him, and the residue, if any, shall be paid to the plaintiff.
- Costs on tender of amends.** If, where money is so paid into Court, the plaintiff elects

^a *Honiball v. Bloomer*, 10 Ex. 538 : 24 L.J. Ex. 11.

^b *Greaves v. Eastern Counties R. Co.*, E. & E. 961 : 28 L.J. Q.B. 290.

^c 11 & 12 Vic. c. 44, ss. 8, 9.

^d As to this *see* also Order 22, r. 6 (c).

accept the same in satisfaction of his damages, he may obtain an order from a judge that the money be paid out to him, and that the defendant pay him his costs to be taxed, and thereupon the action is to be determined, and the order is to be a bar to any other action for the same cause.^a

If the defendant obtains judgment upon verdict or otherwise, he is in all cases entitled to his full costs, to be taxed as between solicitor and client.^b

Costs as
against
plaintiff.

The plaintiff, if successful, is entitled to his costs as in ordinary cases, but he does not get them if it appears that he was actually guilty of the offence of which he complains that he was convicted, or that the penalty or imprisonment inflicted was not more than that allowed by law.^c

As against
defendant.

In all cases where by the Act it is enacted that no action is to be brought under particular circumstances, the Court or a judge, if any such action is brought, may, upon the application of the defendant, and upon an affidavit of facts, set aside the proceedings in such action, with or without costs.^d

In pro-
hibited ac-
tion pro-
ceedings
may be set
aside.

Numerous other statutes have been passed for the protection of public bodies and officers in the execution of their duties, which contain provisions analogous to those which have been given under the statutes which have already been referred to: see 5 & 6 *Will. iv. c. 60, s. 109* (The Highway Act, 1835); 1 & 2 *Will. iv. c. 41, s. 19*, as to special constables; 5 & 6 *Vic. c. 109, s. 15*, as to parish constables; 19 & 20 *Vic. c. 69, s. 6*, as to county police appointed under 2 & 3 *Vic. c. 93, & 3 & 4 Vic. c. 88*; 45 & 46 *Vic. c. 50, s. 191* (2) as to borough constables; 10 *Geo. iv. c. 44, s. 4*, as to metropolitan police; see also 2 & 3 *Vic. c. 71, s. 53* (Police Courts Act); 13 & 14 *Vic. c. 61, s. 19*, as to high bailiff or bailiffs; 12 & 13 *Vic. c. 92, s. 27* (Prevention of Cruelty to Animals Act); 10 & 11 *Vic. c. 24, s. 209* (Towns Improvement Clauses Act, 1847); 18 & 19 *Vic. c. 120, s. 224* (Metropolis Local Management Act, 1855); 22 & 23 *Vic. c. 66, s. 28* (Sale of Gas Act, 1859); 25 & 26 *Vic. c. 102, s. 106*, as to Metropolitan Board of Works, Vestries, District Boards. Similar provisions are likewise incorporated in many local and personal acts.

Tender of
amends
under
various
statutes.

^a 11 & 12 *Vic. c. 44, s. 11.*

^b *Ibid. s. 14.*

^c *Ibid. ss. 13, 14.*

^d *Ibid. s. 7.*

CHAPTER V.

COSTS ON AWARDS.

Various
modes of
referring
cause or
matter in
dispute.
Under
Judicature
Act, 1873.

THERE are several modes in which a cause or matter in dispute may be referred.* Thus, under section 56 of the Judicature Act, 1873, the Court of Appeal, the Divisional Court, or a judge before whom any cause or matter may be pending, may refer the same for inquiry and report to any official or special referee, and the report of any such referee may be adopted wholly or partially by the Court, and may, if so adopted, be enforced as a judgment of the Court. Then, again, by section 57, the Court or a judge may, either with the consent of the parties, or without their consent in any cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot, in the opinion of the Court or judge, be conveniently had before a jury, or conducted by the Court through its other ordinary officers, order on such terms as may be thought proper, any question or issue of fact, or any question of account arising therein, to be tried either before an official referee or before a special referee to be agreed upon between the parties. By section 58 the report of any referee upon any question of fact, in all cases of any reference to a trial by him under the Act, is, unless set aside by the Court, to be equivalent to the verdict of a jury. In references of this kind the Court or a judge either makes provision for the costs, or reserves the question respecting them for decision after the referee has made his inquiry and reported thereon.

Under
C.L.P. Act,
1854, s. 3.

Besides these modes of reference, the parties may consent to have the matter or question in dispute referred ; or there may be a compulsory reference to an arbitrator appointed by the parties, or to a master of the High Court, under section 3 of the Common Law Procedure Act, 1854.

The order of reference generally contains a provision that

* It is not here proposed to treat exhaustively the question of costs on awards ; the subject is dealt with at length in *Russell* on Arbitration, but a few of the leading principles and the decisions under the Judicature Acts will be shortly referred to.

the costs of the cause shall abide the event, and that the costs of the reference and award shall be in the discretion of the arbitrator.

The old procedure relating to references under Section 3 is still in existence.^a If, therefore, the order of reference is silent as to costs, the successful party is not entitled to costs.^b An arbitrator appointed under that section has no power over the costs, either of the cause, reference or award, unless the rule or order under which he is appointed gives him that power.

Order of reference silent as to costs.

Where an action in which formal judgment has been entered for the plaintiff for the amount claimed, had been referred to a master under section 3 as a matter of account to find for what amount judgment should be ultimately entered, but the order which was drawn up by consent of the parties was silent as to costs, the Court refused an application for an order for costs made on behalf of the party in whose favour the award was made, being of opinion that the question depended upon the agreement between the parties, whether there should be any costs or not; and further a doubt was expressed whether in a case such as that before the Court there was any power to give the costs applied for as costs incident to a proceeding in the High Court.^c

Again, if an action is compulsorily referred under section 3 to a master upon the terms, costs of the cause and reference to be in the discretion of the master, the certificate that the action was properly brought in the Superior Court must be given in the award in the first instance, and cannot afterwards be endorsed on the award, for the master's power to certify expires when he has once made his award.^d

Certificate that action properly brought in High Court to be given in award.

The general principle is that the arbitrator can only award costs where the power to do so is given to him by the parties in the submission. This power is generally express; but in one case it may be implied, viz., where an action is referred to the arbitrator for his determination; for there the power given to the arbitrator to determine the action includes a power to award costs to the party entitled to them, but this power extends to the costs of the cause only and not to the costs of the reference.^e

Power of Arbitrator over costs.

^a *Wimshurst v. Barrow Shipbuilding Co.* 2 Q.B. D. 333, 337, 338 : 46 L.J. Q.B. 477 ; *Cruickshank v. Floating Baths Co.*, 1 C.P. D. 260 : 45 L.J. C.P. 684 ; see also Order 36, r. 10.

^b *Leggo v. Young*, 16 C.B. 626 : 24 L.J. C.P. 200 ; *Bell v. Postlethwaite*, 5 E. & B. 695 : 25 L.J. Q.B. 63.

^c *Wimshurst v. Barrow Shipbuilding Co. supra.*

^d *Bedwell v. Wood*, 2 Q.B. D. 626 : 46 L.J. Q.B. 725.

^e *Gray*, 410 ; *Roe d. Wood v. Doe*, 2 T.R. 644 ; see also Russell on Arbitration, 381 (ed. 6).

An arbitrator has no power at all over the costs where they are ordered to abide the event, and he ought not, therefore, to deal with them in any way in his award.

Where an arbitrator directs one party to pay to the other the costs of the cause, these costs will only include such costs as the party would ordinarily have been entitled to if the action had been tried with a jury.^a

The arbitrator has power over the costs of the award where the order of reference gives him power over the costs of the reference.^b

Where an award is silent as to costs, the rule is that the costs of the cause follow the event.^c

If the costs are ordered to abide the event of the award, those costs will include the costs of the reference as well as the costs of the cause.^d

Where costs are to abide the event, the event means the legal event ;^e the arbitrator need not therefore mention the costs, as they will follow the legal event of the award.^f

Costs in
discretion
of Arbitra-
tor.

Where under a submission, which may be made a Rule of Court, the costs are in the discretion of the arbitrator, and he awards costs generally to be paid by one of the parties, the award is good, inasmuch as the amount of costs can be ascertained on taxation, but until the amount has been ascertained no action can be brought to recover the costs.^g

Costs of
making
award rule
of Court.

The costs of making an award a Rule of Court are in the discretion of the Court where the cause or matter is referred by a judge's order to arbitration, the costs of the action and of the reference being left to the discretion of the arbitrator.^h

Each party is in general entitled to the costs of issues found in his favour where the costs are to abide the event.ⁱ

^a *Rigby v. Okell*, 7 B. & C. 57.

^b *Walker v. Brown*, 51 L.J. Q.B. 424.

^c *Young v. Gye*, 10 Moore, 198 ; *Mackintosh v. Blyth*, 1 Bing. 269.

^d *Wood v. O'Kelly*, 9 East, 436.

^e See *Langridge v. Campbell*, 2 Ex. D. 281 : 46 L.J. Ex. 277 ; *Stevens v. Chapman*, L.R. 6 Ex. 213 : 40 L.J. Ex. 123 ; *Forshaw v. De Wette*, L.R. 6 Ex. 200 : 40 L.J. Ex. 153 ; *Dunhill v. Ford*, L.R. 3 C.P. 36 : 37 L.J. C.P. 32 ; *Moore v. Watson*, L.R. 2 C.P. 314 : 36 L.J. C.P. 122 ; *Galatti v. Wakefield*, 4 Ex. D. 249 : 48 L.J. Ex. 80 ; *Cooper v. Pegg*, 24 L.J. C.P. 167 ; *Matlock Gas Light Co. v. Peters*, 6 E. & B. 215 : 25 L.J. Q.B. 273 ; *Reynolds v. Harris*, 3 C.B. N.S. 267 : 28 L.J. C.P. 26 ; *Kelcey v. Stupples*, 32 L.J. Ex. 6 : 1 H. & C. 576.

^f *Gray*, 412 ; *Jupp v. Grayson*, 1 C.M. & R. 523 : 3 Dowl. 199.

^g *Holdsworth v. Barsham*, 31 L.J. Q.B. 145 : 2 B. & S. 480 ; in err. 32 L.J. Q.B. 289 : 4 B. & S. 1.

^h *Carter v. Burial Board of Tonge*, 29 L.J. Ex. 293 : 5 H. & N. 523.

ⁱ *Gray*, 416.

The rule as to the apportionment of the costs of particular issues has been followed since the passing of the Judicature Acts in some cases where the action has been referred to arbitration, with the following term as to costs, viz., *costs of the cause to abide the event*—but the cases on this point do not seem to be quite in accord with each other, as will appear from the instances which will be given. Thus in one case it would seem to have been decided that, where an action has been referred to arbitration, costs of the cause to abide the event, the party for whom judgment is ultimately entered is entitled to the costs of the cause, while the other party is not entitled to any costs at all;^a but, on the other hand, it has also been decided that, although the party in whose favour the event has been found may be entitled to the costs of the cause, still the other party is entitled to the costs of those issues upon which he has succeeded.^b

Costs of
issues
where cost
to abide
event.

Thus, in *Neale v. Clarke*, the plaintiffs brought an action to recover £1,029 15s. 6d., admitting that that sum was reduced by payment to £280 12s. Particulars of the claim were then delivered claiming the sum of £1,029 15s. 6d., but giving no credit either for payment or set-off. The defendants, who were the executors of one Clarke deceased, by their statement of defence denied the plaintiff's claim to £1,029 15s. 6d. or any part thereof, and claimed payment and set-off for money advanced, money had and received, work and labour, goods sold and delivered, and also claimed a balance to be due to them on the whole account of £200. The cause was then referred to an arbitrator, "costs of the cause to abide the event; costs of the reference and award to be in the discretion of the arbitrator." The arbitrator found that the defendants were indebted to the plaintiffs in the sum of £1,067 os. 6d., and that the plaintiffs were indebted to the defendants to the extent of £1,055 10s. 3d., and that the defendants were entitled to set off this amount against the plaintiffs' amount, thus leaving a balance of £11 10s. 3d., due from the defendants to the plaintiffs, and the arbitrator further awarded that the plaintiffs should sign judgment for that sum, and that the defendants should pay all the costs of the reference and award. Upon this state of facts it was held, on the authority of *Potter v. Chambers*,^c already referred to, that the plaintiffs were entitled to the general costs of the action; and it was also held by *Kelly CB.* that the plaintiffs and defendants respectively were entitled to the costs of those issues which had been decided

*Neale v.
Clarke.*

^a *Chatfield v. Sedgwick*, 4 C.P. D. 383; on appl. at p. 459.

^b *Neale v. Clarke*, 4 Ex. D. 286; *Cole v. Firth*, 4 Ex. D. 301 (*n.*): 40 L.T. N.S. 851.

^c 4 C.P. D. 457; 48 L.J. C.P. 274.

in their favour. In *Chatfield v. Sedgwick*^a the Court of Appeal held that where an action was referred to an arbitrator, costs of the cause to abide the event, the defendant in whose favour the event was decided was alone entitled to the costs of the action.^b

*Galatti v.
Wakefield.*

It has also been held^c that, where an action has been referred by consent to arbitration, upon the terms "the costs of the cause to abide the event, and the arbitrator to have discretion as to the costs of the award," the arbitrator has power to direct the defendant to pay the costs of the reference and award, although the plaintiff may be deprived of the costs of the cause, under the County Courts Act, 1867, sec. 5. The *ratio decidendi* being that the parties may, if they choose, contract themselves out of the operation of the County Courts Act, and agree that the costs of the reference shall be in the discretion of the arbitrator. "No Act of Parliament," said *Brett L.J.* in that case, "has been cited which forbids that agreement from being carried into effect."^d

*Cole v.
Firth.*

In *Cole v. Firth*^e the plaintiffs sought to recover £404 odd for work and labour done and materials supplied by them as engineers. The defendants in their statement of defence traversed the allegations in the claim, and alleged that the work was not according to contract and was useless to them, and by way of counterclaim claimed £480 as damages for alleged loss arising from the breach of contract of the plaintiffs. The cause and counterclaim were referred to an arbitrator, "costs of the cause and counterclaim to follow the event, costs of the reference and award to be in the discretion of the arbitrator." The arbitrator found that the plaintiffs were entitled to recover £371 on their claim and the defendants £375 on their counterclaim, and he awarded that the plaintiffs should pay to the defendants the balance of £4, and the cost of the reference and award. The district registrar ordered judgment to be signed for the defendants for the sum of £4 and for the costs of the cause, counterclaim, reference, and award, to be taxed. The Exchequer Division directed so much of the registrar's order as related to costs to be struck out, and further ordered the defendants to pay the costs of and relating to the plaintiffs' claim and the proof thereof, and the plaintiffs to pay the costs of and

^a 4 C.P. D. 459 : 48 L.J. C.P. 274.

^b See remarks of Cockburn C.J. in *Stooke v. Taylor*, 5 Q.B. D. 569 : 49 L.J. Q.B. 857.

^c *Galatti v. Wakefield*, 4 Ex. D. 249 : 48 L.J. Ex. 80.

^d *Ibid.* p. 251.

^e 4 Ex. D. 301 (n.). This case is fully reported, 40 L.T. N.S. 851.

relating to the defendants' counterclaim and the proof thereof. This case, it may be observed, deals only with the question of the apportionment of the costs of the issues upon which each party had succeeded, and not with the question as to which of the parties was entitled to the general costs of the cause.^a

In *Chatfield v. Sedgwick*^b the plaintiff sought to recover a sum of £57 10s. balance due for work done and money lent, after giving the defendant credit for £25 paid on account. The defendant pleaded a set-off, and also made a counterclaim for goods supplied, to the amount of about £24. The action was referred to a master, the costs of the action to abide the event. The master certified that there was due from the defendant to the plaintiff on his claim the sum of £16 odd, and from the plaintiff to the defendant the sum of £23 on the counterclaim, and that the balance due from the plaintiff to the defendant was £7 odd. It was held by the Court of Appeal that the defendant was entitled to the costs of the action. The question which was referred to the master was, which of the parties, taking claim and counterclaim together, was the creditor and which was the debtor? The master found in favour of the defendant, and this was the event which the costs were to follow.

Costs of claim and counterclaim, where action referred, cost to abide event.

The effect of this decision was discussed in *Stooke v. Taylor*,^c where *Cockburn C.J.* states^d that "it was held by the Common Pleas Division that, while the plaintiff, having recovered less than £20, was disentitled to costs by section 5 of the County Courts Act, 1867, the defendant not coming under the operation of the County Courts Act, was, though he recovered only £6 18s. 7d., entitled to the costs of his counterclaim. This decision was in my opinion perfectly correct." Further on, in his judgment (at p. 580), his Lordship remarks: "If, however, the *ratio decidendi* in *Chatfield v. Sedgwick*^e is to be taken to be, as from the language of the judgment would seem to be the case, that the provision in the order of reference makes the right to costs depend absolutely on whether the balance is on the side of plaintiff or defendant, I must respectfully dissent from such a position, and can only hold myself bound by the decision where the facts with which I have to deal are precisely the same as those in *Chatfield v. Sedgwick*, which certainly is not the case here. The effect of such an order of reference is, I apprehend, simply to substitute the reference as regards the issues of fact, and the legal consequences resulting from them for the trial by judge and jury. The provision

Stooke v. Taylor

^a 40 L.T. N.S. at p. 857.

^b 4 C.P. D. 457 : 48 L.J. C.P. 274.

^c 5 Q.B. D. 569 : 49 L.J. Q.B. 857.

^d *Ibid.* at p. 580.

^e 4 C.P. D. 457 : 48 L.J. C.P. 274.

that the costs of the action shall abide the event, amounts to no more than that whatever would have been the legal effect of the verdict and judgment as regards costs shall remain the same as if the verdict of the jury had been taken, and judgment had followed thereon. It cannot be taken to mean that where the counterclaim is in effect a cross-action founded on an independent cause of action and not a mere set-off, as for instance where one party claims liquidated, the other unliquidated damages, or where the claim of the one is founded on contract, that of the other in tort, the balance of the amount awarded on their respective claims is to constitute the event, so as to entitle the party in whose favour such balance is found to the costs of the action."

The answer to these objections would seem to be given in the judgment of *Field J.* in the same case,^a in which he relies on the decision of the Court of Appeal in *Chatfield v. Sedgwick*, and further adds,^b "the ratio decidendi in *Chatfield v. Sedgwick* was that the language used by the parties evinced an intention that the party who should succeed in obtaining an award in his favour for the balance, after taking all the claims into consideration, should be entitled to his costs. . . . If parties choose before going into an expensive inquiry to stake the costs upon the final balance, each does it with full knowledge that the other party's claims are liquidated or unliquidated, or are matters of set-off or counterclaim, as the case may be, and at the time when the agreement is made the precise limits of the campaign are fully or exactly marked out and known to both sides. They may, and I think often do, prefer to make the costs dependent upon the final result rather than upon the very complicated and difficult to be ascertained question of cross costs and costs of issues; and in such a case there is of course no injustice in holding them to their bargain."

In *Stooke v. Taylor*^c the arbitrator found that the plaintiff was entitled to £10, and £25 damages on his claim, and that the defendant was entitled to £10 damages on his counterclaim. Both the claim and counterclaim were for debt and damages exceeding £100. The order of reference contained the provision "costs of the action to abide the event of the award and certificate." It was held by *Cockburn C.J.* and *Manisty J.*, that the plaintiff was entitled to the costs of his claim, and the defendant to the costs of his counterclaim, on the ground that the order of reference did not alter the rights of the parties. A contrary

^a *Stooke v. Taylor*, *supra*.

^b *Id.* at p. 585.

^c 5 Q.B. D. 569 : 49 L.J. Q.B. 857.

opinion, however, was expressed by *Field J.*, on the ground that the case was governed by the provision in the order of reference as to costs, and that the plaintiff was entitled to the costs of the reference, whilst the defendant was not entitled to any. Moreover, the effect of such a provision had been already decided by the Court of Appeal in *Chatfield v. Sedgwick*.^a

When a cause is referred after issue joined, and the costs of the cause are to abide the event of the award, the arbitrator, whether he has to make an award or only a certificate, must either dispose specifically of each issue, or so adjudicate that it can clearly be inferred from the award or certificate in which way each of the issues has been determined, so as to enable the master to tax the costs for the party in whose favour each issue respectively has been found.^b This principle has been followed since the Judicature Acts, and it has been held that where a cause is referred, "costs to abide the event," the word "event" is to be read distributively, and an award was accordingly remitted to the arbitrator to find specific issues where he had found in favour of the defendant for £3 2s. 6d. in a cause in which the defendant set up a counterclaim.^c

Disposal by Arbitrator of each issue specially, where action referred, costs to abide event.

"Event," meaning of.

In one case, before the Judicature Acts, it was decided that where two parties agree to refer several disputes, "the costs of the reference and award to abide the event of the award," the costs of the event are not distributable, and neither party is entitled to costs unless the event of the award is altogether in favour of one party.^d

The Court in general either grant or refuse, with costs, an application to set aside an award.^e If the application is refused without any mention being made as to the costs of the application, those costs will be costs in the cause.^f

Costs of application to set aside award.

An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties (Order 64, r. 14).

Costs may be taxed on an award notwithstanding the time for setting aside the award has not elapsed (Order 65, r. 15).

Taxation of costs on award.

^a 4 C.P. D. 459 : 48 L.J. C.P. 274.

^b Russell on Arbitration, 348 (ed. 6) and cases there cited.

^c Ellis v. De Silva, 6 Q.B. D. 521 : 50 L.J. Q.B. 328 ; and see Whaley v. Laing, 5 H. & N. 480 : 29 L.J. Ex. 313.

^d In re Marsack & Webber, 29 L.J. Q.B. 109.

^e Duke of Beaufort v. Welch, 10 A. & E. 527 ; Wade v. Malpas, 2 Dowl. 638 ; Goddard v. Smith, 13 L.T. N.S. 159 ; see also Goodall v. Ray, 4 Dowl.

1 ; Hocken v. Grenfell, 4 Bing. N.C. 103.

^f Clarke v. Owen, 2 H. & W. 324.

CHAPTER VI.

PAYMENT INTO AND OUT OF COURT AND TENDER.

Payment into Court in satisfaction,
or in alternative.

BY Order 22, r. 1, where any action is brought to recover debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court or a judge, pay into Court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with defence denying liability (except in actions or counterclaims for libel or slander), pay money into Court which shall be subject to the provisions of rule 6.

In action on bond.

Provided that in an action on a bond under the statute 8 & Will. iii. c. 11, payment into Court shall be admissible in particular breaches only, and not to the whole action.

Payment in to be pleaded.

Rule 2. Payment into Court shall be signified in the defence and the claim or cause of action in satisfaction of which such payment is made shall be specified therein.*

Payment into Court on tender.

Rule 3. With a defence setting up a tender before action, the sum of money alleged to have been tendered must be brought into Court.

Payment in, notice to plaintiff of.

Rule 4. If the defendant pays money into Court before delivering his defence, he shall serve upon the plaintiff a notice specifying both the fact that he has paid in such money, and also the claim or cause of action in respect of which such payment has been made. Such notice shall be in the Form N 3 in Appendix B, with such variations as circumstances may require.

The Form, omitting formal parts, is as follows :—Take notice that the defendant has paid into Court £ , and say that that sum is enough to satisfy the plaintiff's claim [or the plaintiff's claim for, &c.]

Rule 5. In the following cases of payment into Court under this Order, viz. :—

* See *Paraire v. Loibl*, 49 L.J. C.P. 481, where it had been held that the items in respect of which the money was paid into Court need not be specified.

Payment into and out of Court and Tender. 59

- (a.) When payment into Court is made before delivery of defence : Money paid in before defence,
- (b.) When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into Court is made, is not denied in the defence : or in satisfaction,
- (c.) When payment into Court is made with a defence setting up a tender of the sum paid : or with plea of tender.

the money paid into Court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the Court or a judge shall otherwise order. May be paid out to plaintiff.

Rule 6. When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into Court has been made, is denied in the defence, the following rules shall apply :—

- (a.) The plaintiff may accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him as hereinafter provided, notwithstanding the defendant's denial of liability, whereupon all further proceedings, in respect of such claim or cause of action, except as to costs, shall be stayed ; or the plaintiff may refuse to accept the money in satisfaction and reply accordingly, in which case the money shall remain in Court subject to the provisions hereinafter mentioned : Where money paid in, in alternative, plaintiff may accept it in satisfaction, and thereupon proceedings stayed, or may refuse to accept, thereupon money remains in Court.
- (b.) If the plaintiff accepts the money so paid in, he shall, after service of such notice in the Form No. 4 in Appendix B, as is in Rule 7 mentioned, or after delivery of a reply accepting the money, be entitled to have the money paid out to himself on request, or to his solicitor on the plaintiff's written authority, unless the Court or a judge shall otherwise order. Form of payment out on acceptance.

The following is the form given :—" Take notice that the plaintiff accepts the sum of £ , paid by you into Court in satisfaction of the claim in respect of which it is paid in."

- (c.) If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in If not accepted by plaintiff.

Balance to
be paid to
defendant.
Repayment
to success-
ful defen-
dant.

Court and be subject to the order of the Court or judge, and shall not be paid out of Court except pursuant of an order. If the plaintiff proceeds with the action in respect of such claim or cause of action or any part thereof, and recovers less than the amount paid into Court, the amount paid in shall be applied so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant. If the defendant succeeds in respect of such claim or cause of action, the whole amount shall, under such order, be repaid to him.

Formerly money paid into Court which had not been taken out by the plaintiff, could be impounded by the Court to answer for a defendant's costs, where the plaintiff failed in his action. But no provision was then made for the re-payment to the defendant of a sum paid into Court if the plaintiff ultimately failed in his action.

Plaintiff
entitled to
costs on
accepting
money
paid in.

Judgment
for taxed
costs.

Rule 7. The plaintiff, when payment into Court is made before delivery of defence, may within four days after the receipt of notice of such payment, or when such payment is first signified in a defence, may before reply, accept in satisfaction of the claim or cause of action in respect of which such payment has been made the sum so paid in, in which case he shall give notice to the defendant in the Form No. 4 in Appendix B, and shall be at liberty, in case the *entire* claim or cause of action is thereby satisfied, to tax his costs, after the expiration of four days from the service of such notice, unless the Court or a judge shall otherwise order, and in case of non-payment of the cost within forty-eight hours after such taxation, to sign judgment for his costs so taxed.

This rule is in substance the same as r. 4 of Order 30, which has been annulled, under which rule it had been decided that the plaintiff followed the course there pointed out, he acquired an absolute right to costs; but if he neglected to give the notice required by the rule, and, notwithstanding, took the money out in satisfaction at a later period than the four days which he had a perfect right to do, he lost his absolute right to costs, but might, nevertheless, apply for costs under the order relating to costs generally,^b and then his right to them would be subject to the exercise of the judge's discretion.^c

^a Archb. Pr. 1094 (ed. 13), citing Anon. Barnes, 280: see also Marshall

104.

^b Then Order 55, but now Order 65.

^c Greaves v. Fleming, 4 Q.B. D. 226: 48 L.J. Q.B. 335.

It would seem that the plaintiff under this rule is entitled to tax his costs only where he accepts the sum paid into Court in satisfaction of the entire claim or cause of action. He therefore would not be entitled to tax his costs in respect of a sum paid into Court where there are other issues or defences upon which the parties are proceeding to trial.

It would seem, however, that the plaintiff would not be entitled to costs under section 5 of the County Courts Act, 1867, if the sum paid into Court, which he accepts in satisfaction of the entire claim or cause of action is less than £20 in an action founded on contract, or £10 if founded on tort.^a

Plaintiff
disentitled
to costs
under
County
Court Act,
1867, s. 5.

Before the Judicature Acts it was the uniform practice to allow a payment into Court only where the cause of action to or in respect of which it was made and pleaded, was not traversed, and was consequently admitted. The ground upon which this practice was based was the inconsistency in the record which it was held would arise if the plea of payment into Court were joined with other defences to the same cause of action.^b That practice has now been altered, and, except in actions or counter-claims for libel or slander (see Order 22, r. 1), the defendant may pay money into Court in respect of a cause of action, the existence of which he at the same time denies. The effect of such a defence upon costs generally will be treated of hereafter, but it is proposed to deal with the effect of payment into Court where there are no other such defences to the matter in respect of which it is paid in.

Practice
before Judi-
cature
Acts.

Present
practice.

Formerly a sum paid into Court was absolutely appropriated to the purpose of satisfaction or amends,^c but the terms upon which a plaintiff may obtain payment out of Court of money paid in under the Rules of Court are now regulated by the provisions of Order 22.

So also, formerly, where money had been paid into Court under a mistake, and the defendant could clearly show to the satisfaction of the Court or a judge that it had been paid in by mistake, an order would be made for the money to be refunded to the defendant,^d provided, however, that the plaintiff had not

Money
paid in
under mis-
take.

^a *Parr v. Lillicrap*, 32 L.J. Ex. 150 : 1 H. & C. 615 ; and *Boulding v. Tyler*, 32 L.J. Q.B. 85 : 3 B. & S. 472, which were decided upon the words of 13 & 14 Vic. c. 61, s. 11 ; *Robertson v. Sterne*, 31 L.J. C.P. 262 : 13 C.B. N.S. 248.

^b *Berdan v. Greenwood*, 3 Ex. D. 251 : 47 L.J. Ex. 628 : *Bullen & Leake's Prec. Pl.* 666, ed. 1869.

^c *Archb. Pr.* 1093 (ed. 13) ; *Malcolm v. Fullarton*, 2 T.R. 648 ; *Cox v. Robinson*, 2 Str. 1027 ; *Vaughan v. Barnes*, 2 B. & P. 392.

^d *Archb. Pr.* 1094 (ed. 13).

Money
taken out
by plaintiff
by mistake.

previously taken it out. And where a plaintiff had taken money out of Court under a mistake as to the effect of so doing, he was allowed, upon certain terms, as for instance, on payment of any cost incurred by the defendant by reason of the money having been so taken out, to pay the same again into Court.^a

Where a sum paid into Court is accepted by the plaintiff to his satisfaction of the entire cause of action, he is entitled after he has given the notice required by Order 22, r. 7, to tax his costs and to sign judgment for the costs so taxed in case of non-payment of such costs within forty-eight hours. Where, however, the plaintiff does not accept the sum paid in as being sufficient to satisfy the claim in respect of which it is paid in, he may go on with the action for the purpose of recovering more.

Costs
where only
issue as to
sufficiency
of sum paid
in.

If the only issue to be tried is whether the sum paid into Court is enough to satisfy the plaintiff's claim, or the claim in respect of which it has been paid in, and that issue is found in favour of the plaintiff with damages *ultra*, he will be entitled to the general costs of the cause. But the defendant, where the issue is decided in his favour, either as in the case of nonsuit or by verdict, is entitled to judgment, and to recover his costs of suit, including, of course, the general costs of the cause.^b

Excep-
tions.

This rule is, however, subject to two limitations—*first*, provided that the Court or a judge do not “otherwise order” under the powers given by Order 65, r. 1, and deprive the successful party of his costs; and *secondly*, as regards the plaintiff, provided that the amount paid into Court, together with the sum recovered at the trial is not less than £20 in any action of contract, or £10 in any action of tort, under the County Courts Act, 1867, s. 5, otherwise he must obtain a certificate or order for those costs; for the amount actually recovered is the test whether a certificate or order ought to be obtained or not.

Payment
in, as to
part only of
claim.

A defendant may pay money into Court to part only of the claim, or as to some only of the causes of action set out in the statement of claim. If the plaintiff accepts the sum in satisfaction of the part of the claim or particular cause of action to which it applies, and then proceeds to trial as to the remaining portion of his claim, he will be entitled to the costs of the action

^a *Emery v. Webster*, 9 Ex. 242 : 23 L.J. Ex. 9; and *Webster v. Emery*, 10 Ex. 901 : 24 L.J. Ex. 186.

^b *Marshall*, 103; and see C.L.P. Act, 1852, s. 73, the latter part of which provided that where a plaintiff replies that the sum paid into Court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded, and that issue being found for the defendant the defendant shall be entitled to judgment and his costs of suit; see also *Rumbelow v. Whalley*, 16 Q.B. 397, 401 : 20 L.J. Q.B. 262; *Langridge v. Campbell*, 2 Ex. D. 281 : 46 L.J. Ex. 277.

down to the time of the statement of defence in which it was pleaded, whatever may be the result of the trial as to the other causes of action.* *Reg. Gen. H.T.* 1855, rule 12,^b provided that "when money is paid into Court in respect of any particular sum or cause of action in the [statement of claim] and the plaintiff accepts the sum in satisfaction, the plaintiff, when the costs of the cause are taxed, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied, up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of *other* causes of action, and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at 'Instructions for [defence]' but not before."

Where money was paid into Court as to part of a claim, and there were defences as to the residue, if the plaintiff did not desire to proceed any further with the action, the former practice was to enter a *nolle prosequi* as to the residue; and in that event the plaintiff was entitled to the general costs of the cause down to the time of the plea, but the defendant was entitled to the costs of the other pleas,^c *i.e.*, to the costs of so much of the plaintiff's claim as was improperly made.^d

In an action for breach of a covenant to keep a house in repair, the defendant paid money into Court generally, and pleaded that the sum paid in was sufficient to satisfy the plaintiff's claim. The plaintiff joined issue upon this defence, and the matter was referred to an official referee, who reported that the sum paid into Court was sufficient to cover any just claim made by the plaintiff. The Court (*Kelly CB.* and *Hawkins J.*) held that as costs are in the discretion of the Court, the proper mode of exercising that discretion in such a case was by directing that the plaintiff should have his costs of the action up to the time of payment into Court, and that the defendant shall have his costs of the action after that time.^e In an earlier case^f the defendant paid money into Court generally, and gave the

Nolle prosequi as to residue of claim, on acceptance of money paid in.

Buckton v. Higgs.

Langridge v. Campbell.

* *Marshall*, 108.

^b Although this rule would appear to be annulled—see Appendix O (17)—it has been inserted here because no provision seems to have been made for the practice in regard to this matter; and *Order 72, r. 2* provides that "where no other provision is made by the Acts or these rules, the present procedure and practice remain in force."

^c *Gray*, 294; *Marshall*, 108; *Goode v. Goldsmith*, 2 M. & W. 202; 5 Dowl. 828.

^d See tit. "discontinuance," *post* chap. ix.

^e *Buckton v. Higgs*, 4 Ex. D. 174.

^f *Langridge v. Campbell*, 2 Ex. D. 281; 46 L.J. Ex. 277.

statutory notice that "that sum is sufficient to satisfy the plaintiff's claim." The plaintiff took the money out under Order 30, r. 3,^a but did not give the notice required by rule 4,^b or any other notice. The cause was subsequently referred under the Common Law Procedure Act, 1854, to the certificate of an arbitrator, upon the terms "costs of the cause to abide the event." No pleadings were delivered by either party, and the arbitrator subsequently certified that the sum paid into Court was sufficient to satisfy the plaintiff's claim. The Court held that the plaintiff was not entitled to any costs, but that the defendant was entitled to the costs from the commencement of the action, upon the ground that the money was paid into Court generally in respect of the whole cause of action, and the costs of the cause were to abide "the event," which was that the plaintiff recovered nothing beyond the amount paid into Court.^c This decision, however, was expressly limited to those cases in which there are no pleadings.^d

effect upon
costs of
payment
, and
trial of
ability.

It remains to deal with the question as to the effect now of a payment into Court upon costs, where the defendant pays money into Court in respect of a cause of action, the existence of which he at the same time denies.

Such a defence is now admissible as a general rule, although prior to Order 22, r. 1, it was somewhat doubtful whether it would be allowed concurrently with other defences in actions brought to try a right, or in respect of property which is denied, or in actions where the plaintiff is by the statement of defence charged with fraud.^e

The effect of such a defence is clearly stated by *Thesiger L.J.*, in *Berdan v. Greenwood*, viz., that where the plaintiff does not accept the money in satisfaction of the entire cause of action in respect of which it is paid in, but elects to go on with the action for the purpose of recovering more, "the issue *quoad* the defence of payment into Court will be the same as it was before the coming into operation of the Judicature Acts, although there will be other issues going to the same cause of action which the tribunal by which the action is tried will have to determine."^f

s to party
entitled to
costs of the
action.

If the plaintiff fails at the trial to establish any causes of action, the judgment will be a general one for the defendant, who will be entitled to the general costs of the cause.

^a The corresponding order is now Order 22, r. 5 (b).

^b Now Order 22, r. 7.

^c *Langridge v. Campbell*, 2 Ex. D. 281 : 46 L.J. Ex. 277.

^d See *Buckton v. Higgs*, 4 Ex. D., at p. 175.

^e *Berdan v. Greenwood*, 3 Ex. D. 251, at p. 258 : 47 L.J. Ex. 628.

^f 3 Ex. D. at p. 256.

If the plaintiff establishes a cause of action, and proves that the sum paid into Court is not sufficient, or that he is entitled to some relief, such, for instance, as an injunction over and above the relief in damages, then the judgment will be a general one for him.

The only remaining alternative is where the plaintiff succeeds in establishing his cause of action, but fails to prove any damage beyond the sum paid into Court, or to establish any title to relief other than damages, and then the issues will be duly found in accordance with the event, and general judgment will be for the defendant, and unless the judge otherwise orders, pursuant to Order 65, r. 1, the defendant will recover the general costs of the cause, while the plaintiff will be entitled only to the costs of the particular issues found in his favour.

If a defendant, after payment of money into Court, obtains judgment of *non pros.*,^a or judgment as in the case of a nonsuit,^b or succeeds, on the issue by obtaining a verdict in his favour at the trial,^c he is entitled to the whole of his costs from the commencement of the action, and the plaintiff will lose his costs.^d

Effect of *non pros.* or nonsuit, or verdict in favour of defendant.

If, where money is paid into Court, the plaintiff afterwards proceeds to trial, and a juror is then withdrawn by consent, neither party is entitled to any costs, but each must pay his own.^e

Or withdrawal of juror.

By Order 22, rule 8, where money is paid into Court in two or more actions which are consolidated, and the plaintiff proceeds to trial in one, and fails, the money paid in and the costs in all the actions shall be dealt with under this Order in the same manner as in the action tried.

Payment in where actions consolidated.

By rule 9 a plaintiff may, in answer to a counterclaim, pay money into Court in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into Court by a defendant.

Payment in by plaintiff to counterclaim.

In an action of replevin, the plaintiff "may, in answer to an avowry, pay money into Court in satisfaction, *in like manner, and subject to the same proceedings as to costs and otherwise, as upon a payment into Court by a defendant in other actions,*"^f and "such payment into Court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond."^g

Payment in, in action of replevin.

^a Postle v. Beckington, 6 Taunt. 158.

^b Postle v. Beckington *supra*; Crosly v. Olorenshaw, 2 M. & L. 335.

^c Ante p. 62; 15 & 16 Vic. c. 76, s. 73.

^d Dax, 97; Marshall, 103; Rumbelow v. Whalley, 16 Q.B. 401; 20 L.J. Q.B. 262.

^e Stodhart v. Johnson, 3 T.R. 657.

^f See C.L.P. Act, 1860 (23 & 24 Vic. c. 126), s. 23.

^g *Id.* s. 24.

Payment
in, in ac-
tion for
libel in
newspaper.

Although a defendant cannot, under Order 22, r. 1, pay money into Court in an action, nor a plaintiff on a counterclaim for libel or slander, together with a defence denying liability, yet it would seem that the right given by 6 & 7 Vic. c. 96 to a defendant to pay money into Court in an action for a libel contained in any public newspaper or other periodical publication is still preserved. By section 2 of that Act a defendant is allowed, under certain circumstances, and on certain conditions therein specified, to plead in an action for a libel contained in any public newspaper or other periodical publication, certain matters by way of apology, and at the time of delivery of such defence to pay into Court a sum of money by way of amends for the injury sustained by the publication of the libel, "and such payment into Court shall be of the same effect, and be available in the same manner and to the same extent, *and be subject to the same rules and regulations as to payment of costs*, and the form of pleading, except as far as regards the pleading of the additional facts hereinbefore required to be pleaded by the defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into Court."

Also al-
lowed in
remitted
action.

The fact that an action for libel has been remitted under section 10 of the County Courts Act, 1867, does not deprive the defendant of his right under 6 & 7 Vic. c. 96, s. 2, to pay money into Court by way of amends. Thus Order 20, r. 4, of the County Court Rules, 1875, provides that, "where in an action for libel or slander, remitted under section 10 of the County Courts Act, 1867, the defendant intends to avail himself of the provisions of sections 1 and 2 of 6 & 7 Vic. c. 96, he shall give notice in writing of such intention, signed by himself or his solicitor, to the registrar five clear days before the day appointed for the trial of the action."

Quære
whether
payment in
with plea of
justifica-
tion in ac-
tion of libel
allowable.

Since the Judicature Acts, and under the Rules of Court which have been annulled, the defence of payment into Court could be pleaded together with other defences; and the defendant could claim the benefit of Lord Campbell's Act, as well as of the Judicature Acts. The payment into Court could therefore be treated as a payment either under Lord Campbell's Act or under the Rules of Court; and in the latter case, as regards costs, would be subject to the ordinary rules relating to costs on payment into Court. Thus in an action for libel published in a newspaper, it was held by the Court of Appeal that the offering of an apology and payment into Court and of a justification could be pleaded together.^a Such a defence, however

^a *Hawkesley v. Bradshaw*, 5 Q.B. D. 302 : 49 L.J. Q.B. 333; see also *Berdan v. Greenwood*, 2 Ex. D. 251 : 47 L.J. Ex. 628.

Payment into and out of Court and Tender. 67

might not now be admissible under Order 22, r. 1, for it would practically amount to payment into Court together with a defence denying liability.

In actions for negligence causing death, brought under Lord Campbell's Act (8 & 9 Vic. c. 93), to recover damages, it is provided by section 2 of 27 & 28 Vic. c. 95, amending the above Act, that it shall be sufficient, if the defendant is advised to pay money into Court, that he pay it as a compensation in one sum to all persons entitled under the said Act for his wrongful act, neglect, or default, without specifying the shares into which it is to be divided by the jury; and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.

Payment
under 8 &
Vic. c. 95

If, therefore, the only issue taken by the plaintiff be as to the sufficiency of the sum paid into Court, and the jury find a verdict for the defendant, he will be entitled to costs as in an ordinary action where issues are found in his favour.

The plaintiff is entitled absolutely to the money paid into Court under Order 22, r. 5, independently of the ultimate result of the action, and may take it out of Court immediately. But if he neglects to do so before a verdict for the defendant, the Court might, following the practice existing before the Judicature Acts, order it to be paid to the defendant towards the satisfaction of his costs, or if the sum exceed what is due to him on that account, so much thereof as would be sufficient for the purpose.^a But the Court would not formerly retain it as security for the defendant, on the chance of a verdict being found in his favour.^b

Right of
plaintiff to
money
paid in.

Where a defendant pleads a tender before action, and pays into Court the amount alleged to have been tendered, as provided by Order 22, r. 3, the plaintiff, by taking the money out of Court and discontinuing the action, or entering a *nolle prosequi*, as to the whole or the remainder of the cause of action, admits the plea. In such a case the plaintiff is not entitled to any costs of his proceedings, but the defendant is entitled to the whole of his costs.^c If the plaintiff denies the tender, or admitting the fact of tender alleges that more was due to him, the costs of the issue raised on the defence of tender will follow the result, as in the case of any other issue.^d

Tender.

In all cases where there has been a tender before action, but

^a *Le Grew v. Cooke*, 1 B. & P. 332 : Gray, 307.

^b *Marshall*, 114.

^c *Dax*, 93 : Gray, 306.

^d *Gray*, 306.

there is some doubt as to its sufficiency, it is more ad to pay the money into Court without pleading the tend though the payment of money into Court subjects the dant to costs up to the time of payment in if the p do not proceed further, nevertheless, if the defendant t tender, and the plaintiff takes issue thereon, and the def fail in proving it, he will thereby at all events become for the general costs of the cause.*

Tender in
actions
against
Justices of
the Peace,

Provision is made by Jervis's Act (11 & 12 Vic. c. 44) tender and payment of money into Court in actions b against justices for acts done by them in the execution c office. By section 11, after one calendar month's notice of at least in writing has been given, and before the action i menced, "such justice to whom such notice shall be give tender to the party complaining, or to his attorney or such sum of money as he may think fit, as amends i injury complained of in such notice; and after such actio have been commenced, and at any time before issue therein, such defendant, if he have not made such tende addition to such tender, shall be at liberty to pay into such sum of money as he may think fit, and which said and payment of money into Court, or either of them, ma wards be given in evidence by the defendant at the trial the general issue aforesaid; and if the jury at the trial s of opinion that the plaintiff is not entitled to damages l the sum so tendered or paid into Court, or beyond the s tendered and paid into Court, then they shall give a verc the defendant, and the plaintiff shall not be at liberty t to be nonsuit, and the sum of money, if any, so pa Court, or so much thereof as shall be sufficient to pay or the defendant's costs in that behalf, shall thereupon be p of Court to him, and the residue, if any, shall be paid plaintiff; or if, where money is so paid into Court in ar action, the plaintiff shall elect to accept the same in satis of his damages in the said action, he may obtain from any of the Court in which such action shall be brought an ord such money shall be paid out of Court to him, and that fendant shall pay him his costs to be taxed, and thereup said action shall be determined, and such order shall be a any other action for the same cause."

or Special
Con-
stables,

Special constables can tender and pay money into under the provisions of 1 & 2 Will. iv. c. 41, s. 19, in all or prosecutions commenced against them for anything c

* Marshall, 115, citing Chit. Archb. 1178.

Payment into and out of Court and Tender. 69

pursuance of that Act; and 5 & 6 Vic. c. 109, s. 15, extends or Parish
the same privilege to parish constables appointed under that Con-
statute. stables,

The provisions of 1 & 2 Will. iv. c. 41, s. 19, extend to county or County
police established under 2 & 3 Vic. c. 93 (see 19 & 20 Vic. c. 69, Police,
s. 6); also to the metropolitan police (10 Geo. iv. c. 44, ss. 4, 41, or Metro-
44, and 2 & 3 Vic. c. 71, s. 53). politan
Police.

A defence of tender of amends before action and payment Tender
into Court is allowed by various statutes, *e.g.*, Railways Clauses under
Consolidation Act (1845), 8 Vic. c. 20, s. 139; 16 & 17 Vic. c. 107, various
s. 316, in actions against revenue officers; Public Health Act statutes.
(1875), 38 & 39 Vic. c. 55, s. 264; Highway Act (1835), 5 & 6
Will. iv. c. 50, s. 109; Municipal Corporations Act (1882), 45 &
46 Vic. c. 50, s. 226; and many other statutes.^a

^a For the various rules of Order 22 and Appendix M of the R. S. C.
1883, which regulate the manner in which money is to be paid into and
taken out of Court, *see* further *post* Appendix part 1.

CHAPTER VII.

SECURITY FOR COSTS.

Object of rule for ordering security to be given. BY the general rule of law, every person not legally incapacitated from so doing is entitled to bring an action, but the Court exercises an equitable control over the costs of actions, in order either to secure their due payment, or to prevent parties being vexatiously harassed by them. These different objects are attained in some cases by calling on the parties to give security for costs, and in others by staying proceedings until payment of costs.^a

In what cases ordered. There are several classes of cases in which the Court will interfere on behalf of the defendant, to oblige a plaintiff to give security for costs, and stay his proceedings until he does so. For instance, where the plaintiff resides abroad, out of the jurisdiction of the Court; or is in insolvent circumstances, as when suing as the mere nominee, or for the benefit of some other person.

Plaintiff resident abroad. With regard to the first class of cases, the general rule is that where a plaintiff is resident abroad, out of the jurisdiction of the Court, he must give security for the costs of the action, and the reason given by *Buller J.*, in an early case^b is, that as the plaintiff has judgment given against him he is not within the reach of our law so as to have process served upon him for the costs.^c

Absence abroad must be more than temporary. To entitle a defendant to security, the absence must be something more than a temporary absence,^d and the burden of proving that the plaintiff, an Englishman, has gone abroad for more than a temporary purpose, lies on a defendant who requires security to be given.^e Therefore, where a person usually resident within the jurisdiction is temporarily out of it, the

^a Gray, 324 *et seq.*

^b *Pray v. Edie*, 1 T.R. 267.

^c *Elan v. Rees*, 3 Dougl. 382; *Ganesford v. Levy*, 2 H. Bl. 111; *Marneffe v. Jackson*, 13 Price 603.

^d *Taylor v. Fraser*, 2 Dowl. 622.

^e *Hanmer v. Mangles*, 12 M. & W. 313; 13 L.J. Ex. 84.

will not compel him to give security.^a Thus, a mere temporary absence after the commencement of an action, is no ground for requiring security to be given,^b although it would be so if the plaintiff goes to reside permanently abroad.^c The Court, however, required security to be given where a plaintiff removed his furniture and absconded, to avoid a charge of bigamy;^d also, where a plaintiff was in gaol under sentence of transportation, because his condition is analogous to that of a person who is abroad, so that he cannot be touched by the process of the Court.^e But the Court refused to order security to be given where the plaintiff, who was a prisoner of war, confined in the prison at Liverpool, had brought an action against the defendant, as master of a ship, to recover wages earned on board an English ship.^f Again, a plaintiff, who was a sea-faring man, was required, although suing in *forma pauperis*, to give security or to have the action stayed until his return, because it appeared that he would be absent on the voyage for at least eighteen months, for this was, in the opinion of the Court, more than a temporary absence within the meaning of the authorities.^g Security will not be required from a person who is actually in this country, although usually resident abroad,^h and although it is sworn that he is about to leave the country.ⁱ

It is now a well-established rule that if a plaintiff, whether he be an Englishman or a foreigner, be within the jurisdiction of the Court at the time of the application by the defendant for security, though only for a temporary purpose, the Court has no power to order him to give security merely on the ground that he is usually resident abroad.^j And this is the rule, not-

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^a *Cole v. Beale*, 7 Moo. 613; *Frodsham v. Myers*, 4 Dowl. 280.

^b *Anon.* 2 Chitty 152.

^c *Kemble v. Mills*, 8 Dowl. 836: 1 Sc. N.R. 402: Gray 326.

^d *Rogers v. Banger*, 4 Dowl. 411. In *Lloyd v. Davis*, 1 Tyr. 533, the Court refused to make an order for security, upon the ground that it did not appear from the affidavit that the plaintiff was out of the kingdom.

^e *Barrett v. Power*, 9 Ex. 338, 340: 23 L.J. Ex. 162; *Harvey v. Jacob*, 1 B. & Ald. 159.

^f *Maria v. Hall*, 2 B. & P. 233; and see *Jacobs v. Stevenson*, 1 B. & P. 96; *Henschen v. Garves*, 2 H. Bl. 383; *Sparenburgh v. Bannatyne*, 1 B. & P. 163.

^g *Foss v. Wagner*, 2 Dowl. 499, at p. 500, *per Taunton J.*

^h *Anon.* 8 Taunt. 737: 3 Moo. 78.

ⁱ *Ciragno v. Hassan*, 6 Taunt. 20: 1 Marshall 21.

^j *Per Thesiger L.J.* in *Redondo v. Chaytor*, 4 Q.B. D. 453, at p. 455: 48 L.J. Q.B. 697, citing *Ciragno v. Hassan supra: Anon.* 8 Taunt. 737; *Willis v. Garbutt*, 1 Y. & J. 511; *Dowling v. Harman*, 6 M. & W. 131; *Tambisco v. Pacifico*, 7 Ex. 816: 21 L.J. Ex. 276; *Naylor v. Joseph*, 10 Moo. 522; *Gurney v. Key*, 3 Dowl. 559; *St. Leger v. Nuovo*, 2 Sc. N.R. 587. See also *Oliva v. Johnson*, 5 B. & Ald. 908: 1 D. & R. 560, and remarks thereon

Order not generally rescinded when once made and security given.

withstanding the fact that the plaintiff is in this country merely for the purpose of the suit, and will go abroad if he obtains judgment in his favour, and if judgment is given against him will also leave the country under circumstances which will prevent the defendant from availing himself of any process by which he can recover costs.^a But if an order has been properly made for a plaintiff to give security for costs, on the ground that he is resident abroad, he will not be entitled to have that order rescinded when he afterwards comes to reside within the jurisdiction of the Court, intending to remain there until the final settlement of the action.^b In one case, however, the Court rescinded an order for security where the plaintiff returned to England before the security was actually given.^c

Compulsory absence abroad, no ground for ordering security.

If a plaintiff commences an action after leaving this country he will be ordered to give security, although his absence may be merely temporary,^d and so also where a plaintiff goes abroad for his own convenience.^e But where the residence abroad is compulsory, security will not be required.^f For this reason English officers in the army or navy, and soldiers or sailors while serving abroad, are exempt from giving security for costs.^g Thus, a lieutenant in the navy, holding the office of post-captain and harbour master, was not required to give security,^h nor a person abroad serving Her Majesty as Commissioner of the Ionian Isles, who had property and a residence in this country;ⁱ but a plaintiff employed as a civil and sessions judge in the service of the East India Company, who, during his absence abroad commenced an action in this country, was required to give security.^j

Exempted persons. Peers of Realm;

The exemption from giving security is extended to certain other persons besides officers and soldiers or sailors on actual service. Thus, peers of the realm, although residing abroad, are privileged, because they are protected from arrest, and secu-

in *Redondo v. Chaytor supra per Thesiger L.J.* and in *Westenberg v. Mortimore*, L.R. 10 C.P. at p. 442, *per Denman J.*

^a *Per Thesiger L.J.* in *Redondo v. Chaytor supra*, at p. 454.

^b *Westenberg v. Mortimore*, L.R. 10 C.P. 438 : 44 L.J. C.P. 289.

^c *Place v. Campbell*, 6 D. & L. 113.

^d *Wells v. Barton*, 2 Dowl. 160.

^e *Lord Nugent v. Harcourt*, 2 Dowl. 578.

^f *O'Lawler v. Macdonald*, 8 Taunt. 736 : 3 Moo. 77 ; *Tullock v. Crowley*, 1 Taunt. 18.

^g *O'Lawler v. Macdonald supra* ; *Lord Nugent v. Harcourt supra* ; *Garwood v. Bradburn*, 9 Dowl. 1031 ; *Whittall v. Campbell*, 5 H. & N. 601 : 29 L.J. Ex. 326 ; *Chappell v. Watts*, 29 L.J. Q.B. 167.

^h *Evering v. Chiffenden*, 7 Dowl. 536.

ⁱ *Lord Nugent v. Harcourt supra*.

^j *Plowden v. Campbell*, 23 L.J. Q.B. 384.

rity for costs is given as a substitution for the personal responsibility of the person abroad.^a So also are ambassadors and the members of their suite exempt, if they sue while filling that character in this country, because they are for this purpose deemed to be resident in that country to which they are accredited.^b But a foreign sovereign, if resident abroad, who is the plaintiff in an action arising out of commercial transactions, will be required to give security.^c

Ambassadors and suite ; but not foreign Sovereign resident abroad who trades.

The rule requiring security on the ground that the plaintiff is not within the reach of our law, so as to have process served upon him for the costs, formerly extended to cases where the plaintiff resided in Scotland or Ireland.^d But the practice in that respect is now different since the passing of the Judgments Extension Act, 1868,^e the reason for compelling a plaintiff resident in Scotland or Ireland to give security having ceased to exist.^f No security for costs where the plaintiff resides in a different part of the Kingdom is required, unless upon special grounds a judge or the Court otherwise order.^g The effect of the statute now is, that when a judgment has been obtained in England, a certificate of such judgment can be registered in the proper office in either Scotland or Ireland, and the Courts there can issue process on such judgment.^h

No security now required from Persons residing in United Kingdom.

The rule as to giving security for costs, where the plaintiff bringing an action in this country is permanently resident abroad, applies equally to a foreigner as to an Englishman. But the fact that a plaintiff is a foreigner usually resident abroad, is no ground for ordering him to give security for costs, provided that at the time when the application for security is made he is actually in this country,ⁱ and in a recent case it has been said that the order for security cannot be made where the foreigner, usually resident abroad, is really in this country merely for the purpose of the suit, and will go abroad if he obtains judgment in his favour, and if judgment is given against him will also leave the country under circumstances which will

Rule as to giving security applies to foreign resident abroad, but not when within jurisdiction at date of application for security.

^a Earl Ferrars *v.* Robins, 2 Dowl. 636.

^b Demontallano, Duke of, *v.* Christin, 5 M. & S. 503; Gray, 326 : Marshall, 440 : 7 Ann. c. 12 ; and see Goodwin *v.* Archer, 2 P. Williams 452.

^c Brazil, Emperor of, *v.* Robinson, 6 A. & E. 801 : 5 Dowl. 522 ; Greece, King of, *v.* Wright, 6 Dowl. 12.

^d Gray, 325 ; Tidd's Practice, vol. i. p. 579 (8th ed.) and cases there cited.

^e 31 & 32 Vic. c. 54.

^f Raeburn *v.* Andrews, L.R. 9 Q.B. 118 : 43 L.J. Q.B. 73.

^g 31 & 32 Vic. c. 54, s. 5.

^h Raeburn *v.* Andrews *supra* p. 120, *per* Blackburn J.

ⁱ Tambisco *v.* Pacifico, 7 Ex. 816 : 21 L.J. Ex. 276 ; Redondo *v.* Chaytor, 4 Q.B. D. 453 : 48 L.J. Q.B. 697, and cases there cited.

prevent the defendant from availing himself of any process by which he can recover costs.^a

Early cases
on the sub-
ject.

There are, however, certain cases decided many years back, in which, although the plaintiff was out of the jurisdiction, the Courts refused to order security to be given: as, for instance, where the plaintiff, who was a sailor, was obliged to go to sea, having exhausted his wages, and having no family relations in this country; ^b or where the plaintiff was a foreigner, on board his own ship, and resided part of the year in England, ^c or where the plaintiff, a seaman, was abroad on a voyage, but had left his family in lodgings in this country. ^d And an application for security was refused in an action brought by a foreigner who was serving on board an English ship; for a foreigner on board an English ship was held to be in the position of a foreigner residing in England. ^e In another case, however, it was held that a plaintiff, the captain of a foreign ship usually trading to this country, who had no fixed residence in this country, was liable to give security, ^f but this decision would seem to be much qualified, if not overruled *pro tanto* by the recent case of *Redondo v. Chaytor*, ^g if, at the time when the application for security is made, the plaintiff is within the jurisdiction of the Court.

Rule not
applicable
to counter-
claim
founded on
distinct
cause of ac-
tion.

The rule as to giving security does not apply to an action in which there is a counterclaim founded on a distinct claim from that sued upon by the plaintiff, a foreigner residing out of the jurisdiction. Thus, where a defendant admitted the plaintiff's cause of action, but set up a counterclaim founded on a distinct claim, the Court refused to make an order for security for costs from the plaintiff, a foreigner residing out of the jurisdiction. ^h Also, where an action on a contract was brought against a foreigner residing abroad, who by his defence denied the breaches, and also made a counterclaim for breaches of the *same* contract against the plaintiff, claiming less damages than the amount of the plaintiff's claim, the Court held that the defendant could

^a *Redondo v. Chaytor supra* at p. 454, *per Thesiger L.J.*

^b *Drummond v. Tillinghist*, 16 Q.B. 740.

^c *Durell v. Matheson*, 8 Taunt. 711 : 3 Moo. 33.

^d *Ford v. Boucher*, 1 Hodge 58.

^e *Jacobs v. Stevenson*, 1 B. & P. 96; *Henschen v. Garves*, 2 H. Bl. 383.

^f *Nylander v. Barnes*, 6 H. & N. 509 : 30 L.J. Ex. 151; and *see Kasten v. Plaw*, 1 Moo. & P. 30; *Nelson v. Ogle*, 2 Taunt. 253.

^g 4 Q.B. D. 453 : 48 L.J. Q.B. 697.

^h *Winterfield v. Bradnum*, 3 Q.B. D. 324 (C.A.), and remarks of *Brett L.J.* at p. 326 : 46 L.J. Q.B. 270.

not be called upon to give security to the extent of the costs occasioned by the counterclaim.^a

Security has also been required from a plaintiff where an action was brought without his knowledge, after he had gone abroad;^b and in an action by a husband and wife to recover damages for personal injuries to the wife, the Court ordered the husband, who was resident abroad, to give security, although the wife resided in England.^c

Where there are several plaintiffs to an action, one of whom only is resident within the jurisdiction, and the remainder abroad, the Court will not require security from the absent plaintiffs,^d even though the plaintiff resident within the jurisdiction may be a bankrupt.^e So also, if there are two plaintiffs, one an Englishman residing within, and the other a foreigner residing out of the jurisdiction, the foreigner will not be required to give security.^f

There is an exception to the rule that persons out of the jurisdiction, whether individuals or a corporation, suing in the Courts here, must give security for costs, and that is where they have *real* property in this country, or at least property of a permanent nature,^g out of which the defendant could recover his costs by process of law. It is not sufficient to show that at the time of the application the plaintiff has *personal* property in this country sufficient to satisfy the costs, because such property is of a fluctuating nature, and might not be available when judgment was obtained.^h On this ground it has been decided that the fact of a foreign corporation having money and Exchequer Bills in England was no answer to an application for security.ⁱ So also, a foreign railway company was ordered to give security, although it had personal property in England, and some of its shareholders were resident in England, and had property and effects within the jurisdiction more than sufficient to pay the amount of capital not paid up.^j The real property possessed

^a *Mapleson v. Masini*, 5 Q.B. D. 144. See remarks of *Field J.* at p. 147, distinguishing this case from *Winterfield v. Bradnum supra*.

^b *Ball v. Adrian*, 1 Taunt. 64.

^c *Hanmer v. Mangles*, 12 M. & W. 313; 1 D. & L. 394; 13 L.J. Ex. 84; but see *Married Women's Property Act*, 1882.

^d *Anon.* 7 Taunt. 307; *Anon.* 1 Dowl. 300; 2 C. & J. 88; *Thornel v. Roelants*, 2 C.B. 300; *Orr v. Bowles*, 1 Hodge 33; *Bawden v. Roe*, 1 Hodge 315.

^e *McConnell v. Johnston*, 1 East. 431.

^f *Dhormasjee v. Grey*, 52 L.J. Q.B. 192.

^g *Kilkenny, &c. Ry. Co. v. Feilden*, 6 Ex. 81, at p. 84, *per Pollock C.B.*: 20 L.J. Ex. 141.

^h *Per Parke B.* in *Kilkenny, &c. R. Co. v. Feilden supra* at p. 85.

ⁱ *Edinburgh & Leith R. Co. v. Dawson*, 7 Dowl. 573.

^j *Kilkenny, &c. R. Co. v. Feilden supra*; *Limerick & Waterford R. Co.*

by the plaintiff must, however, be available for the purpose of answering the defendant's claim, and security was ordered to be given in one case where the plaintiff's affidavit merely stated that he was in possession of an estate of considerable value over and above all charges affecting the same. In other words, the plaintiff ought to show that the property is available for the defendant's process, which might not be the case if there were any charges upon it.^a

Security required from nominal plaintiff, resident abroad, and suing for benefit of third party.

A defendant is entitled to security from a plaintiff who is resident abroad if he is merely the nominal plaintiff in an action brought for the benefit of a third party. Thus, where an action was brought upon a bond in the name of an obligee resident abroad for the benefit of an assignee in this country, the nominal plaintiff (*i.e.*, the obligee) was ordered to find security, notwithstanding that the assignee who resided in this country offered a written undertaking to the defendant to pay all such costs as the nominal plaintiff might be liable to pay to the defendant. In such a case it would seem that the undertaking offered by the assignee could only be enforced, if at all, by bringing an action upon it.^b

Security not required from Executor or Administrator.

Executors and administrators suing for the benefit of the estate of the testator or intestate, do not come within the rule requiring security from a plaintiff suing, not in his own right, but in a representative character, and for the benefit of third parties. Executors and administrators sue in their own right, and are entitled to all the debts of the testator, both at law and in equity.^c And further, as was pointed out by *Bovill C.J.* in *Sykes v. Sykes*,^d with regard to executors, though there may be legatees, it does not follow that they will receive their legacies, and consequently there is no person interested to give, or who would be willing to give, security for costs. Since the passing of 3 & 4 Will. iv. c. 42, s. 31, however, executors and administrators would seem to have been put on the same footing as to costs as ordinary plaintiffs. The same rules, therefore, as to giving security for costs will apply to them. Thus a plaintiff suing as executor for the benefit of the testator's estate will not be required to give security unless he is residing abroad out o

v. Fraser, 4 Bing. 394 : 6 L.J. C.P. 9. The practice laid down in these cases as to Scotch and Irish plaintiffs giving security for costs is now altered by the Judgments Extension Act (31 & 32 Vic. c. 54); see *Raeburn v. Andrews*, L.R. 9 Q.B. 118 : 43 L.J. Q.B. 73.

^a *Swinbourne v. Carter*, 23 L.J. Q.B. 16.

^b *Youde v. Youde*, 3 Ad. & E. 311.

^c *Per Montague Smith J.* in *Sykes v. Sykes*, L.R. 4 C.P. 645, at p. 649.

^d L.R. 4 C.P. 645, 647 : 38 L.J. C.P. 281 ; *Ridgway v. Jones*, 29 L.J. Q.B.

the jurisdiction of the Court.^a Nor will a defendant be entitled to security, or to a stay of proceedings until security is given, where the action has been brought by two executors, one of whom is out of the jurisdiction of the Court, and the other is in insolvent circumstances.^b

The assignee of a bankrupt suing for the benefit of the estate does not come within the rule^c which requires a mere nominal plaintiff suing for the benefit of a third person to give security for costs, although he may be in insolvent circumstances.^d It is the duty of the assignee to collect assets for the benefit of the estate, and an order that he should give security might obstruct him in the performance of his duty and prevent the assets from being collected.^e

Nor from
assignee
bankrupt

Where a plaintiff in an action filed a petition for liquidation by arrangement, under section 125 of the Bankruptcy Act, 1869 (32 & 33 Vic. c. 71), and a receiver was appointed under rule 260 of the Bankruptcy Rules, 1869, it was held that the plaintiff was rightly ordered to give security for costs.^f

Where a company registered as an *unlimited* company is being wound up, and an action is brought in the name of the company, under the directions of the official liquidator, against a debtor of the company, the Court will not make an order that the plaintiffs give security for costs. "The defendants," said *Cockburn C.J.* in delivering judgment,^g "ask us to apply the principle—that, where an insolvent party is put forward as a plaintiff by a solvent person, the plaintiff shall give security for the defendant's costs—to the present case where insolvent plaintiffs are themselves suing in their own names and for their own debt. It is true that it is under the directions of the official liquidator, but that can make no difference It is clear that if the company were not being wound up, and were suing of their own accord, and not under the directions of the liquidator, they could not be compelled to give security for costs." And *Mellor J.* also remarked,^h that he was satisfied

^a *Chevalier v. Finnis*, 3 Moo. 602 : 1 B. & B. 277 ; *Chamberlain v. Chamberlain*, 1 Dowl. 366.

^b *Sykes v. Sykes*, L.R. 4 C.P. 645 : 38 L.J. C.P. 281.

^c *Perkins v. Adcock*, 14 M. & W. 808 ; *Elliott v. Kendrick*, 12 Ad. & E. 597 : 10 L.J. Q.B. 42 ; *Goatley v. Emmott*, 15 C.B. 291 : 24 L.J. C.P. 38.

^d *Denston v. Ashton*, L.R. 4 Q.B. 590 : 10 B. & S. 761 : 38 L.J. Q.B.

^e *Ridgway v. Jones*, 29 L.J. Q.B. 97.

^f *Per Hayes J.* in *Denston v. Ashton supra*, at p. 591.

^g *Malcolm v. Hodgkinson*, L.R. 8 Q.B. 209.

^h *United Ports Insurance Co. v. Hill*, L.R. 5 Q.B. 395, 396 : 39 L.J. Q.B.

227.

ⁱ *Id.* at p. 397.

that the company were the party suing, and that the action was only regulated by the intervention of the official liquidator.

Security from Limited Company, when required.

As regards actions brought by *limited* companies it has been enacted by 25 & 26 Vic. c. 89, s. 69, that, "where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that, if the defendant be successful in his defence, the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

Security not required in action under 8 & 9 Vic. c. 93.

The Courts also will not require security to be given by plaintiffs in actions brought under Lord Campbell's Act (8 & 9 Vic. c. 93). Thus, in an action brought by the plaintiff as administrator, under that Act, for the benefit of the widow and children of the deceased, an order for security was refused upon the ground that the plaintiff was suing merely for the benefit of others.^a

Insolvent plaintiff suing as mere nominee.

The next branch of the subject to be treated of relates to those cases where the plaintiff is bankrupt or insolvent, or has wholly assigned the debt,^b and is suing as the mere nominee, or for the benefit of a third party.

It may here be convenient to state that by the law of this country a party is not precluded from enforcing his rights in a court of law by reason merely of his poverty,^c or bankruptcy (if the action is carried on in his name for his own benefit, and not that of his trustees),^d or by reason of general insolvency.^e

Poverty only no ground for ordering security.

The poverty of a plaintiff who sues as a common informer on a penal statute is no ground for calling on him to give security for costs. Thus an application to stay proceedings until security was given, was refused in a *qui tam* action in which the plaintiff

^a Larssen v. Monmouthshire R. & Canal Co. 16 L.T. N.S. 289.

^b Perkins v. Adcock, 14 M. & W. 809, 810; Parker v. G.W.R. Co. 19 L.J. C.P. 335; Day v. Smith, 1 Dowl. 460; Heaford v. M'Knight, 2 B. & C. 479; 4 D. & R. 81.

^c Ross v. Jacques, 8 M. & W. 135; 9 Dowl. 737; Morgan v. Evans, 7 Moo. 344; Day v. Smith, 1 Dowl. 460, 461; Perkins v. Adcock, 14 M. & W. 809, 810; 15 L.J. Ex. 7; Sykes v. Sykes, L.R. 4 C.P. 645; 38 L.J. C.P. 281; United Ports Insurance Co. v. Hill, L.R. 5 Q.B. 395, 396; 39 L.J. Q.B. 227; Armitage v. Grafton, 1 B.C.R. 30; 10 Jur. 377.

^d Webb v. Ward, 7 T.R. 296; Mason v. Polhill, 1 C. & M. 620; 3 Tyr. 595, 2 Dowl. 61; Stead v. Williams, 5 C.B. 528; 17 L.J. C.P. 109; Taylor v. Montague, 2 M. & W. 315.

^e Snow v. Townsend, 6 Taunt. 123; 1 Marsh 477; Beckham v. Knight, 4 Bing. N.C. 74; 6 Dowl. 227; see also Archb. Pr. (13 ed.) pp. 1141 *et seq.*; Wray v. Brown, 8 Dowl. 280; 6 Bing. N.C. 271; 8 Scott 557.

was sworn to be in very indigent circumstances, and to be very unlikely to be able to pay costs if unsuccessful, and to have commenced several similar actions ;^a also in a *qui tam* action which was brought for extortion and appeared vexatious.^b

The legislature has, however, interfered to protect persons against whom actions of tort are brought by plaintiffs who have no "visible means" of paying costs in the event of the verdict being against them. Thus it is enacted by the County Courts Act, 1867 (30 & 31 Vic. c. 142, s. 10),^c that "it shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in a Superior Court, to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant, should a verdict be not found for the plaintiff, and thereupon a judge of the Court in which the action is brought shall have power to make an order that, unless the plaintiff shall within a time to be therein mentioned give full security for the defendant's costs to the satisfaction of one of the masters of the said Court, or satisfy the judge that he has a cause of action fit to be prosecuted in the Superior Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named and the costs of the parties in respect of the proceedings, subsequent to the order of the judge of the Superior Court, shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings in the Superior Court shall be allowed according to the scale in use in such latter Court."^d

Any judge^e or master^f at chambers has power to make the order for security under this section, but he must be satisfied that the plaintiff has no visible means of payment, and when so satisfied, he may direct security to be given *or* the case to be remitted for trial to the County Court, unless the plaintiff shall satisfy him that the case is a fit one to be prosecuted in the Superior Court.^f The order of the judge is open to review by the Court, and his decision as to whether the plaintiff has a cause of

^a Gregory v. Elridge, 2 Cr. & M. 336 : 2 Dowl. 259 ; Field v. Carrow, 2 H.Bl. 27.

^b Foster v. Roundall, 1 Jur. 119 : W.W. & D. 58.

^c Preserved by Judicature Act, 1873 (36 & 37 Vic. c. 66), s. 67.

^d Owens v. Woosman, L.R. 3 Q.B. 469 : 37 L.J. Q.B. 159.

^e Walsh v. Smith, 30 L.T. N.S. 304 : 22 W.R. 576.

^f Per Montague Smith J. in Sykes v. Sykes, L.R. 4 C.P. 645, 649 : 38 L.J. C.P. 281.

action fit to be prosecuted in the Superior Court is not final.^a But the Court is very unwilling to interfere with the discretion of the judge or master at chambers.^b A County Court judge has power, where the action has been transferred under this section to make an order that proceedings shall be stayed until the costs of a previous action, which involved substantially the same question, and which had been brought in the High Court against the same defendant, have been paid by the plaintiff. This section does not preclude the plaintiff from enforcing his remedy, if he fails to give security, it merely changes the tribunal.^c The meaning of the term "visible means" in section 6 of the Irish Common Law Procedure (Amendment) Act, 1870 (33 & 34 Vic. c. 109), the wording of which as to this point is *in pari materia* with the above-mentioned section 1 has been explained in an Irish case to be, "properties which the defendant could reach to pay his costs in the event of obtaining a verdict."^d The "means" must be *tangible*, not necessarily *visible* to the eye. On this ground, therefore, the Court refused an application under section 6 in an action for slander brought by the plaintiff who was clerk in the house of a respectable tradesman at a salary of £100 per annum.^e

Test as to whether security is to be ordered. Insolvency of plaintiff.

Although the mere poverty of the plaintiff is no ground for requiring him to give security for costs, yet where he is bankrupt or insolvent, and is suing as the mere nominee, or for the benefit of another party, security will be required. Therefore, where another person is in fact proceeding with an action in the name of the party on the record, and that party is in insolvent circumstances, the Court will compel him for whose benefit the action is proceeding to come in and give security for costs.^f The real question in these cases is, whether the action is virtually the action of the plaintiff or of some other party. Where a plaintiff assigned his property for the benefit of his creditors to certain trustees, and afterwards took the benefit of the Insolvent Act, and became bankrupt, security was ordered to be given in an action brought by the trustee in the bankrupt's name.^h So also where an insolvent debt-

^a Owens v. Woosman LR. 3 Q.B. 469; 37 L.J. Q.B. 159.

^b Jennings v. The London General Omnibus Co. 30 L.T. N.S. 26
Rippon v. Joyce, 31 L.T. N.S. 475.

^c Reg. v. Bayley; *In re* Mason v. Aird, 8 Q.B. D. 411; 51 L.J. Q.B. 22.

^d *Per Bovill C.J.* in Sykes v Sykes *supra*, p. 647.

^e *Per Whiteside C.J.* in Counsel v. Garvie, Ir.R. 5 C.L. 74, 77.

^f Counsel v. Garvie *supra*.

^g Andrews v. Morris, 7 Dowl. 714; *per Coleridge J.*; see also remarks *Tindal C.J. passim*, in Alexander v. Townley, 5 Sc.N.R. 454-455.

^h Elliott v. Kendrick, 9 Dowl. 196; 10 L.J. Q.B. 42.

proceeded with an action after having executed a deed of assignment, although no trustees had been appointed. The around of the decision in this case was, that the action was on a policy of insurance, the rights of which by the assignment would pass to the trustees, who would be entitled to the benefit of it if they chose, and therefore security ought to be given.^a

So also was security required where the plaintiff took the benefit of the Insolvent Act, *after issue joined*, but before notice of trial had been given, the Court remarking that the plaintiff's assignee, and if none had been appointed, some of his creditors, should give security before the action ought to proceed.^b Where the trustees interfere, and proceed with an action commenced by the plaintiff *before* his bankruptcy, they will be required to find security,^c but it would seem to be otherwise, if they refuse to interfere in the action^d unless the benefit of the action must necessarily pass to them.^e Nor will security be ordered to be given where the Court can infer from the facts of the case that the trustees have not interfered or are not likely to interfere.^f In one case, however, the Court compelled a plaintiff who had become bankrupt, after verdict obtained in his favour and a rule for a new trial granted, to give security, the inference, from the facts of the case, being that the action was really carried on by the trustees.^g It may here be observed that in those cases where a bankrupt plaintiff is ordered to give security, it is the trustees, and not the bankrupt, who are in substance called upon to find the security.^h

Security when to be given by trustee of bankrupt plaintiff.

Formerly, when a plaintiff became bankrupt *pendente lite*, the defendant's remedy was to plead the bankruptcy, so as to stop the action altogether;ⁱ but a restriction was usually put upon this plea by the Court imposing as a condition upon which the security for costs was given that the defendant

^a Doyle v. Anderson, 2 Dowl. 596, 598, *per Patteson J.*

^b Heaford v. M'Knight, 4 D. & R. 81, 82 : 2 B. & C. 579.

^c Mason v. Polhill, 2 Dowl. 61 : 1 Cr. & M. 620 : 3 Tyrw. 595.

^d Beckham v. Knight, 6 Dowl. 227 : 4 Bing. N.C. 74 ; *see* remarks of Williams J. on this case in Denton v. Williams, 8 Dowl. 123, 125 ; Doe d. Colnaghi v. Blick, 5 Scott 714 ; Snow v. Townsend, 6 Taunt. 123 : 1 Marsh. 477 ; Taylor v. Montague, 2 M. & W. 315 ; Wilkinshaw v. Marshall, 4 Tyr. 993.

^e Andrews v. Marris, 7 Dowl. 714.

^f Stead v. Williams, 5 C.B. 528 : 17 L.J. C.P. 109.

^g Denton v. Williams, 8 Dowl. 123.

^h Wray v. Brown, 8 Dowl. 280, *per Tindal C.J.* : 6 Bing. N.C. 271 : 8 Scott 557.

ⁱ Stead v. Williams *supra* ; *see* also Malcolm v. Hodgkinson, L.R. 8 Q.B. 209.

should undertake not to plead the bankruptcy.^a And by the Common Law Procedure Act, 1852,^b section 142, it was provided that "the bankruptcy or insolvency of the plaintiff in any action which the assignees^c might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order, but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy." This section has been held to apply only to the case of a plaintiff who becomes bankrupt *after* the commencement of the action.^d Security for costs was also formerly required where the plaintiff filed a petition for liquidation by arrangement, under the Bankruptcy Act, 1869, section 125, and a receiver was appointed under that Act. And the reason of the rule requiring security to be given in one case and not in the other, was because bankruptcy might have been pleaded and so the action be stopped altogether, whereas liquidation could not have been pleaded.^e

bankruptcy not
abated.

successor
interest
be made
party.

The law on this particular branch of the subject would seem to be somewhat altered by the rules of Court, which appear to give the judge a wide discretion as to the terms upon which actions shall be finally disposed of, when the plaintiff has become bankrupt or gone into liquidation *pendente lite*. Thus, by Order 21, r. 20, "no plea or defence shall be pleaded in abatement:" and by Order 17, r. 1, it is provided that "a cause or matter shall not become abated by reason of the . . . bankruptcy of any of the parties if the cause of action survive or continue, and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite*." By rule 2, "in the case of . . . bankruptcy or devolution of estate by operation of law of any party to a cause or matter, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the . . . trustee or other successor in interest, if any, of such party, be made a party, or be served with notice in such

^a *Manley v. Mayne*, 3 M. & Ry. 381; *Minchin v. Hart*, 1 Chitty 215; *Alexander v. Townley*, 4 M. & G. 772.

^b 15 & 16 Vic. c. 76, s. 142 recently repealed by 46 & 47 Vic. c. 49, sched.

^c Now the trustees.

^d *Stanton v. Collier*, 3 E. & B. 274; 23 L.J. Q.B. 116.

^e *Malcolm v. Hodgkinson*, L.R. Q.B. 209.

manner and form as hereinafter prescribed, and *on such terms* as the Court or judge shall think just, and shall make such order for the disposal of the cause or matter as may be just." By rule 3, in case of an assignment creation or devolution of any estate or title pendente lite, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved ; and by rule 4, "where by reason of . . . bankruptcy or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and such new party or parties, may be obtained *ex parte* on application to the Court or a judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence."

Action to continue c devolution of title. New part may be added.

Ex parte applicatio to add.

Rules 5, 6 and 7 of Order 17 deal with the manner in which any order obtained under rule 4 may be served, discharged or varied ; and rules 8 and 9 enable the opposite party to get rid of an action where one of the parties die.

It would seem that a defendant may be ordered to give security for costs where the writ of summons is specially indorsed under Order 3, r. 6 ; for it is provided by Order 14, r. 6, that leave to defend may be given unconditionally, or subject to such terms as to the giving security or otherwise as the Court or a judge may think fit. The condition upon which a defendant is allowed to defend is generally the payment of a sum of money into Court, and this sum, although perhaps not security for costs in the strict sense of the term, may practically be considered to be so.

Security where writ specially endorsed.

Under Order 50, r. 8, the Court or a judge, in an action for the recovery of specific property other than land in which either one party or the other claims a lien in respect of such property, may order possession of the property to be given up to the party claiming, upon payment of the sum claimed into Court, together with such further sum, if any, for interest and costs, as the Court or judge may direct. Rule 8 is as follows :—"Where an action is brought to recover, or a defendant in his defence seeks by way of counterclaim to recover specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court or a judge may, at

Claim of lien.

Payment of sum for interest and costs into Court to abide event.

any time after such last-mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise, to the satisfaction of such Court or judge, order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs, as such Court or judge may direct, and that upon such payment into Court being made, the property claimed to be given up to the party claiming it."

The practical effect of this rule is that the sum paid into Court by the party to cover the costs is in the nature of security for costs.

lunatic. The fact that the plaintiff is a lunatic is no ground for requiring him to give security for costs.^a The case cited, however, was an application for security for costs in error, the plaintiff in error being a lunatic.

infant. By Order 16, r. 16, infants may sue as plaintiffs by their next friends in the manner heretofore (*i.e.*, before the passing of the rule) practised in the Chancery Division, and may in like manner defend by their guardians appointed for that purpose. But the insolvency of the next friend is no ground for compelling the infant to give security.^b The reason for this would seem to be that the next friend is appointed by the Court, who can, in their discretion, appoint another if it appears that the next friend is not a responsible person.^c The Court will remove the relative of an infant who has been appointed next friend to sue on his behalf if he is insolvent, unless it appears that no other person can be appointed in his place.^d For, as was pointed out by *Martin B.*, the person appointed *prochein amy*, ought to be competent to pay costs, or otherwise injustice is done to the defendant.^e

married woman. Security for costs will not be required from a married woman who sues without her husband, under the provisions of the Married Women's Property Act, 1882.^f But it would seem that she is still liable, when so suing, to the ordinary rules as to a plaintiff giving security if she desires to sue by herself.

Under the former practice, a married woman could, by leave of the Court or a judge, sue or defend without her husband, and

^a *Steel v. Allan*, 2 B. & P. 437.

^b *Yarworth v. Mitchell*, 2 Dowl. & R. 423.

^c *Watson v. Fraser*, 8 M. & W. 660 : 10 L.J. Ex. 420.

^d *Lees v. Smith*, 29 L.J. Ex. 294 : 5 H. & N. 632 ; *Duckett v. Satchell*, 1 Dowl. & L. 980.

^e *Ibid.* at p. 295.

^f 45 & 46 Vic. c. 75 ; *Threlfall v. Wilson*, 8 P.D. 18 ; *Severance v. The Civil Service Supply Association*, 48 L.T. N.S. 485.

without a next friend, on giving such security, if any, for costs, as the Court or a judge might require. If, however, the married woman had separate property available for costs, in the event of judgment being obtained against her, she was not required to find security. But if she had no separate property so available, nor any visible means of payment of costs, she was required to give security.^a

The defendant in replevin, who in this matter cannot be distinguished from, and is practically, the plaintiff, is subject to the ordinary rules as to giving security.^b Thus, where he resides out of the jurisdiction, he is liable to give security.^c

It sometimes happens that a defendant in interpleader proceedings is ordered to give security. This, at first sight, would appear contrary to the ordinary rule that it is the plaintiff who must give security; but the real question in such cases is whether the party against whom security is claimed is really in the position of plaintiff or not. If the defendant in interpleader proceedings is the party initiating the proceedings and carrying on the litigation, he may be called upon to give security in those cases where it is the practice for an ordinary plaintiff to give security.^d Thus, where an execution creditor who was resident out of the jurisdiction was made the defendant in an interpleader issue, the Court compelled him to give security.^e A plaintiff in an interpleader issue, if he is a foreigner residing out of the jurisdiction, may be called upon to give security for costs, upon the ground that a real defendant in an interpleader issue stands in the same position as any other defendant, and is entitled to security for costs.^f In the converse case, a defendant who is really the plaintiff, must find security if he is a foreigner resident out of the jurisdiction. The rule has been shortly and succinctly stated by *Denman J.*, in *Belmonte v. Aynard*^g as follows:—"I think the principle on which security for costs is ordered is clearly this, viz., that one who is substantially in the position of plaintiff initiating an action, and is a foreigner residing abroad, shall be bound to give security for costs." But the defendant in an interpleader issue, who is really interested in the result thereof as plaintiff, is not entitled to call upon the plaintiff in

^a *Brown v. North*, 9 Q.B. D. 52 : 51 L.J. Q.B. 365.

^b *Hiskett v. Biddle*, 3 Dowl. 634.

^c *Selby v. Crutchley*, 1 Br. & B. 505 : 4 Moo. 280.

^d *Belmont v. Aynard*, 3 C.P. D. 221, 224 : in err. 352.

^e *Williams v. Crossling*, 3 C.B. 957 ; *Webster v. Delafield*, 7 C.B. 187 ; *Williams v. Gray*, 19 L.J. C.P. 382 ; *Mellin v. Dumont*, 17 W.R. 672.

^f *Benazech v. Bessett*, 2 Dowl. & L. 801 : 1 C.B. 313.

^g 4 C.P. D. at p. 223.

the issue to give security for costs upon the ground that the latter is a foreigner residing abroad.^a

Where the assignees of a bankrupt sued a banker for a sum deposited with him by the bankrupt, which sum was claimed by a third party as part of a fund held by the bankrupt in trust, the Court ordered an issue to be tried in the name of the bankrupt against the assignees, the cestui que trust, who was the person beneficially interested, to find security for the defendant's costs.^b

Where an auctioneer, who was sued for the deposit money paid on a sale by auction of real estate, on the ground that the vendor's title was defective, applied for a rule calling upon the vendor and purchaser to interplead, the Court, on its appearing that the vendor had no other property than that of which the title was disputed, refused to substitute the vendor as defendant unless the original defendant gave security for costs.^c

Again, the plaintiff, the assignee of an insolvent debtor, sued the defendant for the proceeds of goods entrusted to him by the debtor before his insolvency for sale. The debtor claimed them as executor, and the assignee and the debtor were ordered to interplead on the defendant bringing the money into Court; but the Court refused to make it a condition of the order that the debtor or the defendant should give security for costs, *Cockburn C.F.*, in the course of the case remarking that the insolvent, as executor, was bound to make the claim.^d

ctions for
covery of
ad.

Although actions for the recovery of possession of land are now commenced by an ordinary writ of summons instead of by the special form of writ of ejectment prescribed by s. 169 of the C. L. P. Act, 1852, and although the subsequent proceedings are almost identical with those in ordinary actions, yet it has been thought advisable to refer to one or two authorities decided, and enactments passed previous to the Judicature Acts, with regard to security for costs, as they may serve as a guide in cases similar to those for which provision had formerly been made, as to whether security for costs should be ordered or not.

Thus, it has been held that an action of ejectment will be stayed until security for costs has been given, where the plaintiff is resident out of the jurisdiction.^e But it would seem that

^a *Belmonte v. Aynard*, 4 C.P. D. 352.

^b *Frost v. Heywood*, 2 Dowl. N.S. 801; see *Ridgway v. Jones*, 29 L.J. Q.B. 97.

^c *Deller v. Prickett*, 20 L.J. Q.B. 151.

^d *Ridgway v. Jones*, 29 L.J. Q.B. 97.

^e *Birchman v. Wright*, Bull, N.P. 111; *Cusack v. Jones*, Barnes, 189; *Lucas v. Fulford*, 2 Burr. 1177; *Marshall*, 376.

the poverty of the plaintiff is not of itself a sufficient ground upon which to support an application for security.^a

It has been held that in an action of ejectment under the C. L. P. Act, 1852, a landlord, on complying with the provisions of section 172, which allowed any person not named in the writ of summons, by leave of the Court or a judge, to appear and defend, on filing an affidavit showing that he is in possession of the land, either by himself, or his tenant^b is entitled, as a matter of right, to be let in to defend, and that the Court or a judge had no power, where the landlord resided out of the jurisdiction, to impose upon him the condition of finding security for costs.^c

Security was also formerly required from the claimant in a second action of ejectment brought against the same defendant, to recover possession of the same premises as those claimed in the first action. Thus, it was provided by the C. L. P. Act, 1854, s. 93, that if any person shall bring an action of ejectment after a prior action of ejectment for the same premises has been or shall have been unsuccessfully brought by such person, or by any person through or under whom he claims against the same defendants, or against any person through or under whom he defends, the Court or a judge may, if they or he think fit, on the application of the defendant at any time after such defendant has appeared to the writ, order that *the plaintiff shall give to the defendant security for the payment of the defendant's costs*, and that all further proceedings in the cause shall be stayed until such security be given, whether the prior action has been or shall have been disposed of by discontinuance, or by nonsuit, or by judgment for the defendant.^d

So also, under s. 213 of the C. L. P. Act, 1852, a landlord could require security for costs to be given by the tenant, the defendant in an action of ejectment, for holding over after the expiration of the term or determination of the tenancy, by due notice to quit, where the tenant's term or interest arose under a lease or agreement in writing.^e

In penal actions brought under s. 224 of the *Municipal Cor-* Penal ac
tions unde

^a Goodright *v.* Thrustout, Cas. Pr. C.P. 15 ; Hullock, 443.

^b This particular provision is reproduced in Order 12, r. 25.

^c Butler *v.* Meredith, 11 Ex. 85 ; 29 L.J. Ex. 239.

^d Keene *d.* Angel *v.* Angel, 6 T.R. 740 ; Doe *d.* Langdon *v.* Langdon, 5 B. & Ad. 864 ; Doe *d.* Hamilton *v.* Hatherley, 2 Str. 1152 ; Doe *d.* Heighley *v.* Harland, 10 Ad. & E. 761 ; Doe *d.* Brayne *v.* Buther, 12 Q.B. 941 ; Tichborne *v.* Mostyn, L.R. 8 C.P. 29 ; 41 L.J. C.P. 113 ; Crowle *v.* Russell, 4 C.P. D. 186 ; 48 L.J. C.P. 76 ; Cobbett *v.* Warner, L.R. 2 Q.B. 108 ; Skene *v.* Davies, 7 B. & S. 463.

^e As to the particular cases to which s. 213 is applicable, *vide* Woodfall's *Landlord & Tenant* (ed. 12), pp. 761 *et seq.*

45 & 46 *Corporations Act*, 1882 (45 & 46 *Vic. c.* 50), against any person for acting in a corporate office without having made the requisite declaration, or without being qualified, or after ceasing to be qualified, or after becoming disqualified, "the Court or judge shall," under the provisions of s. 224, sub-sec. 2, "on the application of the defendant, within fourteen days after he has been served with writ of summons in the action, require the plaintiff to give security for costs."

Security when and how to be given. By Order 65, r. 6, in any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such times and in such manner and form as the Court or a judge shall direct.

Application for security. The application for security formerly could not be made before the defendant had entered an appearance to the action.^a It is, however, to be observed that rule 6 says the security may be given at such times as the Court or a judge shall direct, so that the application can now be made at any time, although formerly it had to be made before issue joined. But, notwithstanding that rule, it would seem that formerly the Court or a judge had a discretion in the matter, and consequently in one case an application for security was granted after the action had been referred to arbitration, and after the time for making the award had been repeatedly enlarged.^b So also, when the application was made before issues joined, although the defendant had undertaken to take short notice of trial; but it was otherwise where he had agreed to take such notice as the plaintiff could give for a specific day.^c An application for security may be made by one of several defendants who has appeared, although the others have not appeared.^d The application is made in the first instance by a summons, returnable in two days before a master at Judges' chambers, calling upon the plaintiff to show cause why he should not give full security for the defendant's costs, to the satisfaction of the master of the Supreme Court.

Supported by affidavit. The application should be supported by an affidavit, in which, under the old practice, it was not necessary to state what was the stage at which the proceedings had arrived,^e as it was for the plaintiff to show that the application was not in time.^f

^a *De la Preuve v. Duc de Biron*, 4 T.R. 697; *Cole v. Beardy*, 5 Dowl. 161.

^b *Gell v. Curzon*, 4 Ex. 813; 19 L.J. Ex. 225; *Dowling v. Harman*, 6 M. & M. 137; 8 Dowl. 165; *Gray*, 336.

^c *Edinburgh & Leith Railway Co. v. Dawson*, 7 Dowl. 576.

^d *Carr v. Shaw*, 6 T.R. 496.

^e *Cole v. Beardy*, 5 Dowl. 161; *contra* *Huntley v. Bulmer*, 6 Dowl. 633; 6 Sc. 247.

^f *Jones v. Jones*, 2 C. & J. 207; 1 Dowl. 313.

The order, if made, is generally made upon the terms that all proceedings shall be stayed until security has been given, or where the application is made in an action of tort under section 10 of the County Courts Act, 1867, upon the terms that unless security be given within the time limited by the order, the action be remitted for trial to a County Court therein mentioned.^a

It was not necessary, to entitle the defendant to the order, that he should have a good defence to the action upon the merits.^b This latter question would most probably have been tested by the plaintiff by an application to sign judgment under Order 14 before the defendant applied for security.

Formerly the application was made before the defendant had taken any step in the action subsequent to his knowledge of the fact which causes him to ask for security,^c but it would seem that he did not waive his right to security by taking any subsequent step, such as obtaining an order for time to deliver a statement of defence or the like, provided that the application was made before issue joined.^d If made after issue joined, the application had to be made promptly, and within reasonable time after acquiring knowledge of the facts which caused him to ask for security.^e It seems that an application for security is too late if made after judgment has been signed.^f

The amount of security is, under Order 65, r. 6, in the discretion of the master who makes the order, and is then fixed by him; and, as a general rule, his discretion will not be interfered with unless a case of manifest or gross error can be made out.^g

Formerly in chancery, £100 was the sum fixed to be given as security,^h but at Common Law a substantial sum was generally required. In certain cases, however, the Chancery rule as to the amount has not been followed. Thus upon an application under section 69 of the Companies Act, 1862, the Court of Appeal in Chancery held that the security for costs to be given by a limited company is not confined to £100, but must be for an amount equal to the probable amount of

^a See R.S.C. 1883, Appendix K, form No. 45.

^b *Edinburgh & Leith R. Co. v. Dawson*, 7 Dowl. 573; *Ciragno v. Hassan*, 1 Marsh. 421; 6 Taunt. 20.

^c *Rex v. Day*, and *Rex v. Patteson*, 1 Dowl. 32.

^d *Fletcher v. Lew*, 5 N. & M. 351; 3 A. & E. 551; *Edinburgh & Leith R. Co. v. Dawson*, 7 Dowl. 573; Archb. Pr. (ed. 13), p. 1143.

^e *Wainwright v. Bland*, 2 C.M. & R. 740; 4 Dowl. 547; *Duncan v. Stint*, 5 B. & A. 702; *Young v. Rishworth*, 8 A. & E. 479 n.; *Doe v. Brood*, 1 Dowl. N.C. 857.

^f *Borghs v. Sessions*, 2 Dowl. 710.

^g *French v. Maule*, 4 M. & Gr. 107; 2 Scott's N.R. 719; *Marshall*, 449.

^h Cons. Order, 40 r. 6.

costs payable.^a And in a subsequent case it was said to be by no means an inconvenient course to require security to be given for the costs up to a certain stage in the proceedings, and then to allow the application to be renewed, as the Court would then be able to form a better opinion as to the probable expense of the suit and as to the amount of security required.^b Thus, where a limited company which was being wound up was plaintiff, it was ordered to give a limited sum until the defendants had put in their answers, the defendants to be at liberty, after the answers had been put in, to renew their application for further security.

Security not confined to future costs but extends to costs already incurred.

Fresh security may be ordered.

The security for costs is not necessarily confined to future costs, but may be extended to costs which have already been incurred in the action, provided that the application is made promptly.^c

Under the old practice, when once security had been given, the defendant could not obtain fresh security if the sureties become insolvent;^d nor could he obtain an increase in the amount given.^e Thus the amount formerly would not be increased, merely because it was apprehended that the expenses attending a commission to examine witnesses might be greater than had been anticipated.^f Some of these rules seem, however, to be qualified by the recent practice already mentioned of the Court ordering security to be given for the proceedings up to a certain stage, and of then allowing an application for further security.

Action may be dismissed if security, when ordered, not given by plaintiff.

The fact that the defendant has obtained an order for the plaintiff to give security—the action to be stayed in the meantime—does not prevent him from applying to have the action dismissed for want of prosecution where the plaintiff has failed to give the security; and the judge has a discretion as to whether the order dismissing the action shall be made or not.^g An order directing “the plaintiff forthwith to give security, no stay of pro-

^a *Imperial Bank of India, China, and Japan v. Bank of Hindustan, China, and Japan*, L.R. 1 Ch. 437 : 35 L.J. Ch. 678.

^b *Western of Canada Oil Lands and Works Co. v. Walker*, L.R. 10 Ch. 628 : 45 L.J. Ch. 165.

^c *Brocklebank v. King's Lynn St. Ship Co.*, 3 C.P. D. 365 : 47 L.J. C.P. 321, overruling *Oxenden v. Cropper*, 4 Dowl. 574 ; see also *Harvey v. Jacob*, 1 B. & Ald. 159 ; *Mason v. Polhill*, 2 Dowl. 61 ; *Republic of Costa Rica v. Erlanger*, 3 Ch. D. 62, 69 : 45 L.J. Ch. 743 ; and *Massey v. Allen*, 12 Ch. D. 807 : 48 L.J. Ch. 692.

^d *Jones v. Jacobs*, 2 Dowl. 442.

^e *Foster v. Colby*, 27 L.J. Ex. 55.

Haseltine v. Watkins, 28 L.J. Ex. 40 ; and see *Reg. v. Southampton Harbour Commissioners*, 34 L.J. Q.B. 164 : 6 B. & S. 407.

^g *Le Grange v. M'Andrew*, 4 Q.B. D. 210 : 48 L.J. Q.B. 315.

ceedings in the meantime, the plaintiff's solicitor undertaking hereby to find such security," was formerly held not to bind the plaintiff or his solicitor to give security unless he proceeded with the action.^a It would seem, however, upon the authority of *Le Grange v. M'Andrew*, that the defendant might apply to have the action dismissed for want of prosecution if the plaintiff did not proceed.

Where a bond is to be given as security for costs, it shall, unless the Court or a judge shall otherwise direct, be given to the party or person requiring the security, and not to an officer of the Court (Order 65, r. 7). The fee on taking a bond is 10s., payable by a stamp impressed or adhesive on the bond.^b

The day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given, are not to be reckoned in the computation of time allowed to plead, answer interrogatories, or take any other proceeding in the cause or matter (Order 64, r. 6).

The security to be given by a defendant who is arrested under section 6 of the Debtors Act, 1869,^c may be a deposit in Court of the amount mentioned in the order of arrest, or a bond to the plaintiff by the defendant and two sufficient sureties (or with leave of the Court or a judge either one surety or more than two), or with the plaintiff's consent any other form of security.

The plaintiff may within four days after receiving particulars of the names and addresses of the proposed sureties give notice that he objects thereto, stating in the notice the particulars of his objections.

In such case the sufficiency of the security is to be determined by a master, who shall have power to award costs to either party.

It is the duty of the plaintiff to obtain an appointment for that purpose, and unless he does so within four days of giving notice of objection, the security is to be deemed sufficient (Order 69, r. 3).

The money deposited, and the security, and all proceedings thereon, are to be subject to the order and control of the Court or a judge (r. 4).

Unless otherwise ordered, the costs of, and incidental to, an order of arrest are to be costs in the cause (r. 5).

^a *Hill v. Fletcher*, 5 Ex. 470 : 19 L.J. Ex. 320.

^b See Court fees : Orders : Oct. 28, 1875, and April 22, 1876.

^c 32 & 33 Vic. c. 62.

Security by bond.

Security under Debtors Act, 1869, s. 6.

Plaintiff to object to security within four days.

Money deposited in control of Court or Judge. Costs of arrest to be costs in cause.

CHAPTER VIII.

PROCEEDINGS IN LIEU OF DEMURRER.—ISSUES OF LAW.

- Demurrer abolished. By Order 25, r. 1, no demurrer shall be allowed.
- Point of law raised on pleading, may be disposed of by order at or after trial, or by consent before trial. By rule 2, any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court, or a judge, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.
- Action may be dismissed if point of law disposes of it. By rule 3, if, in the opinion of the Court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court or judge may thereupon dismiss the action, or make such other order therein as may be just.
- Pleading disclosing no cause of action may be struck out. By rule 4, the Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.
- Issues of fact and law follow the event. And by Order 65, r. 2, when issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event.

The general effect of these rules is, that *prima facie* the party, whether plaintiff or defendant, who is successful upon an issue of law, will be entitled to the costs of the issue, unless otherwise ordered. Under the old practice, where costs were directed to "abide the event"—and the expression "follow the event" would seem to be identical—it was held that the "event" did not there mean the *actual* event, but the *legal* event.^a The

^a *Tidd*. 915, 916; *Canham v. Fiske*, 2 Cr. & J. 128.

same construction may perhaps be put upon r. 2 of Order 65 ; and if so, the successful party on an issue of law would therefore be entitled to the costs of the issue. There is, however, one exception to this rule, which must be mentioned :—thus a plaintiff will not be entitled to the costs of an issue of law although he has succeeded thereon, if he recovers a sum less than £20 if the action is founded on contract, or £10 if founded on tort, unless he obtains a certificate or order under the County Courts Act, 1867, s. 5.^a

Costs where plaintiff recovers less than £20 on contract or £10 in tort.

If, however, the plaintiff wholly fails to succeed in the action, he would be entitled to set off the costs of the issue of law decided in his favour against the costs payable to the defendant ; for section 5 does not affect a plaintiff who has wholly failed.^b

Set-off of costs of issue of law.

But if a plaintiff in any action of contract recovers by judgment or otherwise (and this would include judgment on an issue of law), a sum, exclusive of costs, not exceeding £50, he will only be entitled to costs on the County Courts scale, unless the Court or a judge otherwise order.^c

Costs where not more than £50 recovered in action of contract.

Formerly, where the costs of a demurrer were ordered to be "costs in the cause," the result of the trial of the issues of fact, so far as the amount actually recovered by a plaintiff was concerned, determined the question whether he would be entitled to the costs of the demurrer or not. A plaintiff who recovered less than the statutory amounts mentioned in section 5 of the County Courts Act, 1867, would only be entitled to the costs of a demurrer decided in his favour where he had obtained a certificate or order under the section.

Result of trial decides if party to costs of demurrer, where such costs were to be costs in cause.

Where there are issues of fact and also of law, the party who has obtained judgment upon the issue of law, but fails upon the issue or issues of fact, is, with the one exception of a plaintiff which has been referred to, entitled to the costs of the issue of law upon which he has succeeded. Section 5 of the County Courts Act, 1867, which says, "if the plaintiff shall recover, &c.," does not apply to a defendant, who would, independently of the ultimate result of the trial of the issues of fact, be entitled to the costs of an issue of law decided in his favour, unless the Court or a judge otherwise ordered, as for

Costs of issues of fact and law.

^a As to former practice see *Abley v. Dale*, 11 C.B. 889 ; 21 L.J. C.P. 104 ; *Dunston v. Paterson*, 28 L.J. C.P. 185 ; 5 C.B. N.S. 267 ; *Prew v. Squire*, 10 C.B. 912 ; 20 L.J. C.P. 175 ; *Mann v. Buckerfield*, 20 L.J. Q.B. 265.

^b See *Gregory v. The Duke of Brunswick*, 3 C.B. 481 ; *Bentley v. Dawes*, 10 Ex. 147 ; 23 L.J. Ex. 279.

^c Order 65, r. 12.

instance by an order that they should be "costs in the cause."

Discontinuance by plaintiff after judgment in his favour on issue of law. A plaintiff who discontinued an action after he had obtained judgment in his favour upon an issue of law, was formerly entitled to set off the costs of the issue of law against the costs of the discontinuance.^a So also was a plaintiff entitled to the costs of an issue of law when he had obtained judgment for the same, even though he afterwards entered a *nolle prosequi*, except as to the costs.^b

Taxation of costs where demurrer to whole action. Formerly, if the demurrer went to the whole action, the successful party was entitled to sign judgment and tax his costs in the ordinary way; but where the demurrer went to a part only of the pleadings, the costs could not be taxed until the final result of the cause had been ascertained, as there could be but one taxation of costs. But where the Court gave leave to a party to amend his pleadings after the demurrer had been delivered, "upon payment of costs," the costs were taxed at once and execution for such costs might be issued before the issue of fact had been tried.^d

One Counsel only allowed to argue demurrer. Only one counsel was formerly allowed to argue a demurrer in the Queen's Bench Division, but when the case was one of importance and difficulty, it was customary to employ another counsel to take notes; and on taxation of costs the master was allowed accordingly.^e The master, however, would allow only two counsel on the argument of an appeal from a judgment in the Queen's Bench Division on an issue of law; for it is the practice to hear two counsel in the Court of Appeal.^f

Under the old practice, the Court either gave judgment on the demurrer for one side or the other, or gave liberty to amend upon payment of costs, or, if it thought fit, ordered the argument of the case to stand over till after the trial of the issues of fact.^g

Allowance on taxation. The master, on taxation, would allow such costs as a reasonably necessary for the argument of the issue of law, *e.*

^a *Mayor of Macclesfield v. Gee*, 13 M. & W. 470 : 14 L.J. Ex. 44; *Wood v. Butcher*, 6 Q.B. 383; *Turner v. Izon*, 5 Scott 596; see also chapter *tit.* "discontinuance" *post.*

^b Archb Pr. 749 (ed. 13), citing *Williams v. Vines*, 6 Jur. 809 : 6 Q. 355.

^c Dax 91.

^d *Dunston v. Paterson*, 28 L.J. C.P. 185 : 5 C.B. N.S. 267; *Bentley Daves*, 10 Ex. 147 : 23 L.J. Ex. 279.

^e Dax 91.

^f *Sneesby v. The Lancashire & Yorkshire R. Co.*, 1 Q.B. D. 42 : 45 L. Q.B. 1.

^g *Vizard's Practice of the Court in Banc.* p. 81.

the costs of making up the issue of law, of copies for the judge or judges, as the case may be, briefs, counsel's fees, &c.^a

In conclusion, then, the costs of an issue of law in general follow the event, with the exception as regards a plaintiff, which has been already pointed out, but the Court or a judge might order such costs to be (1) payable at once, in which case they would be taxable at once, or (2) payable in any event, in which case the taxation would be deferred until the issues of fact had been tried ; and the party in whose favour the order had been made would then only be entitled to tax such costs.

SPECIAL CASE.

The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court (Order 34, r. 1). Special case stated by agreement.

Every such special case shall be divided into paragraphs, numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case, any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial (*ibid.*). Form of case. Court may draw inferences of law and fact.

Every special case is to be printed by the plaintiff, and signed by the several parties, or their counsel or solicitors, and is to be filed by the plaintiff. Printed copies for the use of the judges are to be delivered by the plaintiff (r. 3). Special case to be printed.

The master, on taxation, would disallow the extra costs occasioned by a departure from the rule as to the form in which the special case is ordered to be stated.^b

By rule 2, if it appear to the Court or a judge that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given, or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the Court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in Special case by order of Court or Judge.

^a As to the former practice see Marshall 66, 67 ; and Jones *v.* Roberts, 2 Dowl. 374.

^b See Reg. Gen. Hil. T. 1862 ; and Hadley *v.* Perks, L.R. 1 Q.B. 444, where the costs of evidence and documents unnecessarily set out at length in an appendix to a special case were disallowed.

such other manner as the Court or judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

Special case where married woman, infant, &c., is party.

By rule 4, no special case in any cause or matter to which a married woman (not being a party thereto in respect of her separate property, or of any separate right of action by or against her), infant, or person of unsound mind, not so found by inquisition is a party, shall be set down for argument without leave of the Court or a judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true.

Entry of special case for argument.

By rule 5, either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 25 in Appendix G, and also if any married woman, infant, or person of unsound mind, not so found by inquisition, be a party to the cause or matter, producing a copy of the order giving leave to enter the same for argument.

Parties may agree as to payment of money and costs.

By rule 6, the parties to a special case may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp duty, that, on the judgment of the Court being given in the affirmative or negative of the questions of law raised by the special case, a sum of money, fixed by the parties, or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, either with or without costs of the cause or matter; and the judgment of the Court may be entered for the sum so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed on appeal.

Application of order.

By rule 7, this order shall apply to every special case stated in a cause or matter, or in any proceeding incidental thereto.

ISSUES OF FACT WITHOUT PLEADINGS.

Issue may be tried without pleadings by consent or order.

By Order 34, r. 9, when the parties to a cause or matter are agreed as to the questions of fact to be decided between them, they may, after writ issued, and before judgment, by consent and order of the Court or a judge, proceed to the trial of any such questions of fact without formal pleadings; and such questions may be stated for trial in an issue in the form No. 15, in Appendix B, with such variations as circumstances may require, and such issue may be entered for trial and tried in the same manner as any issue joined in an ordinary action, and the proceedings

shall be under the control and jurisdiction of the Court or a judge, in the same way as the proceedings in an action.

By r. 10: "The Court or a judge may, by consent of the parties, order that upon the finding in the affirmative or negative of such issue as in the last preceding rule mentioned, a sum of money, fixed by the parties, or to be ascertained upon a question inserted in the issue for that purpose, shall be paid by one of the parties to the other of them, either *with or without the costs* of the cause or matter."

Order for money to be paid upon finding.

By r. 11: "Upon the finding on any such issue, as in rule 9 mentioned, judgment may be entered for the sum so agreed or ascertained as aforesaid, *with or without costs*, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed or unless the Court or a judge shall otherwise order for the purpose of giving either party an opportunity for moving to set aside the finding, or for a new trial."

Judgment to be entered on finding.

By r. 12: "The proceedings upon such issue as in rule 9 mentioned, may be recorded at the instance of either party, and the judgment, whether actually recorded or not, shall have the same effect as any other judgment in a contested action."

Effect of recording proceedings on issue.

CHAPTER IX.

COSTS OF DISCONTINUANCE.

Discontin-
uance
before de-
fence,
or after
defence
before step
taken, by
notice.

BY *Order 26, r. 1*: "The plaintiff may, at any time before receipt of the defendant's defence, or, after^a the receipt thereof before taking any other proceedings in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants, or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn.

Subse-
quently by
leave.

"Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action.

"Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a judge; but the Court or a judge may before, or at, or after the hearing or trial, *upon such terms as to costs*, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out.

When de-
fence or
counter-
claim may
be with-
drawn.

"The Court or a judge may, in like manner, and with the like discretion as to terms, upon the application of the defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence or any part thereof without such leave."

Judgment
for costs of
discontin-
uance.

By rule 3, any defendant may enter judgment for the costs of the action, if it is wholly discontinued against him, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued, in case such respective costs are not paid within four days after taxation.

Stay of sub-
sequent ac-
tion.

And by rule 4, if any subsequent action shall be brought be-

^a As to former practice as to terms upon which plaintiff was entitled to discontinue after plea pleaded *see* Reg. Gen. H.T. 1853, r. 23; Howarth v. Brown, 32 L.J. Ex. 99; 1 H. & C. 694.

payment of the costs of a discontinued action, for the same, substantially the same, cause of action, the Court or a judge, if they or he think fit, order a stay of such subsequent action until such costs shall have been paid.

Formerly, if it clearly appeared that the discontinuance was considered necessary by the misconduct or fraud of the defendant, the Court allowed the plaintiff to discontinue without imposing the condition of payment of costs.^a

Misconduct of defendant.

An action does not now become abated by reason of the death of any of the parties, if the cause of action survive or continue; consequently the same condition of payment of the costs of discontinuance will be imposed on the plaintiff, where the personal representative of a deceased party has been made a party to the action under Order 17, r. 2; for the personal representative would be in the same position as if he had been the original plaintiff.^b The Court or a judge has power, however, under Order 17, r. 2, to order the substitution of a personal representative on such terms as the Court or a judge shall think just; consequently, the above-stated practice as to making the plaintiff pay the costs of discontinuing an action might be varied by the terms of an order made under that rule. The same remarks apply to the case of the substitution of a party in the event of the marriage or bankruptcy of any of the parties, provided that the cause of action survives or continues. But formerly a plaintiff was allowed to discontinue without payment of costs, where the defendant became insolvent after the commencement of the action, and the plaintiff had not taken any further steps in it after he had become aware of the insolvency.^c Where, however, the plaintiff had taken any steps after notice of the insolvency of the defendant, he was not allowed to discontinue except upon payment of costs. Nor, as a general rule, where a plaintiff had obtained an order to discontinue upon payment of costs, and had acted upon the order by attending the taxation under it, was he allowed to abandon it.^d

Terms on which discontinuance allowed in event of party's death.

Marriage or bankruptcy.

Under the *Common Law Procedure Act*, 1852 (15 & 16 Vic. c. 76), s. 200,^e the claimant in ejectment was entitled, upon notice

Claimant in ejectment may discontinue by notice.

^a *Ames v. Ragg*, 2 Dowl. 35; see also *Poensgen v. Chanter*, 6 Scott 300; *Marshall* 85; *Paterson v. Powell*, 3 Moore & Scott 195; 2 Dowl. 738; *Paterson v. Johnson*, 3 Moore & Scott 200; 2 Dowl. 739.

^b Order 17, r. 1.

^c As to former practice of making a personal representative a party by suggestion; see *Common Law Procedure Act*, 1852, s. 138; *Benge v. Swaine*, 15 C.B. 784; 23 L.J. C.P. 182.

^d *Ford v. Stock*, 1 Dowl. N.S. 763.

^e *Benge v. Swaine*, *supra*.

^f Now repealed by 46 & 47 Vict. c. 49, sched.

duly given, to discontinue the action as to one or more of the defendants, and thereupon the defendant to whom such notice was given was entitled to sign judgment forthwith for his costs.

Rule to dis-
continue
formerly no
stay.

Under the old procedure, service of a rule to discontinue did not operate as a stay of proceedings;^a but where the plaintiff obtained leave to wholly discontinue upon payment of costs, the costs had to be paid at once, otherwise the defendant was at liberty to proceed with the action, but r. 3 of Order 26 varies the practice, and allows the defendant to sign judgment for the costs if not paid within four days after taxation.

Discon-
tinuance
where de-
fendant
pleads
matters
arising
pending
action.
Before de-
fence
delivered.

In certain cases where the defendant pleads matters which have arisen pending the action, the plaintiff is allowed to confess the defence and sign judgment for his costs. Thus, it is provided by Order 24, r. 1, that any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be raised by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counterclaim alleged therein by the defendant, it may be raised by the plaintiff in his reply, either alone, or together with any other ground of reply. And by rule 2, "where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counterclaim arises after reply, or after the time limited for

After de-
fence.

After reply.

delivering a reply, has expired, the plaintiff may, within eight days after such ground of defence has arisen, or at any subsequent time, by leave of the Court or a judge, deliver a further defence or further reply setting forth the same." By rule 3,

Confession
of defence
by plaintiff.

"whenever any defendant, in his statement of defence, or in any further statement of defence as in the last rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence (which confession may be in the Form No. 5, in Appendix (B) with such variations as circumstances may require), and may thereupon *sign judgment for his costs* up to the time of the pleading of such defence, unless the Court or a judge shall, either before or after the delivery of such confession, otherwise order."

Where, under the old procedure, a defendant added a plea of the defendant's bankruptcy since the original pleadings were

^a Beeton v. Jupp, 15 M. & W. 149 : 15 L.J. Ex. 120 ; Edgington v. Proudmann, 1 Dowl. 152.

delivered, such plea was in the nature of a plea *puis darrein continuance*, and all other defences were thereby waived. The plaintiff was thereupon at liberty to confess the plea, and was entitled to the costs up to the time of the pleading of such plea. The practice would appear to be the same under Order 24, r. 3.^a

When, before the Judicature Acts, a defendant pleaded a plea *puis darrein continuance*, which was a plea confessing that the action was rightly brought and maintained up to the time of that plea, and in form stated that the plaintiff ought not further to maintain his action, the plaintiff was in no case compellable to go on with his action, but might discontinue without payment of costs,^b and further was entitled to the costs of the cause up to the time of pleading such plea.^c

This rule, however, did not apply where a plea *puis darrein continuance* was pleaded by one or more only out of several defendants,^d and the present rules of Court do not in any way seem to expressly, although they may impliedly, authorize a plaintiff to deliver a confession to a statement of defence or further statement of defence in which is pleaded any ground of defence which has arisen after action brought, where such defence has been pleaded by one or more only out of several defendants.

The effect of a discontinuance by the plaintiff for the purpose of obtaining costs, after a plea *puis darrein continuance* had been pleaded, was to place him substantially in the same position as a defendant confessing an action. In the former case the defendant was entitled to final judgment, and the plaintiff could not afterwards assert in a fresh action any claim which he might have set up in the action which he had bartered away.^e In other words, if the plaintiff signed judgment on a plea *puis darrein continuance*, he could not bring a fresh action for the same cause; but it would seem that he can do so now where he wholly discontinues the action, or withdraws a part or parts of an alleged cause of complaint.^f

Formerly, where the plaintiff obtained leave to discontinue on payment of costs, in order to make the discontinuance complete, he was bound not only to obtain an appointment and have the

^a Foster v. Gamgee, 1 Q.B. D. 666; 46 L.J. Q.B. 576; see also Callender v. Hawkins, 2 C.P. D. 592.

^b Wollen v. Smith, 9 A. & E. 505, 506, per Lord Denman C.J.

^c See Reg. Gen. T.T. 1853, rr. 22, 23 (pleading rules).

^d Ibid. r. 23.

^e Per Willes J. in Newington v. Levy, L.R. 5 C.P. 613; in error 6, *ibid.* 180; 40 L.J. C.P. 29.

^f Order 26, r. 1.

costs taxed;^a but the costs when taxed must also have been actually paid;^b and a tender of a sum more than enough to cover the costs was not sufficient.^c If the discontinuance was before plea, the only course open to the defendant was to proceed in the action, but if after plea pleaded, the defendant could in such a case sign judgment of *non pros*.^d But now under Order 26, r. 3, a defendant may sign judgment for the costs of an action, if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued, in case such costs are not paid within four days after taxation.

Discontin-
uance
where there
are issues
of law.

A plaintiff who has succeeded on issues of law, and then discontinues as to the issues of fact, would be entitled to the costs of those issues, and the defendant to the costs of the discontinuance.^e The costs of the issues of law could not formerly be set off against the costs of the discontinuance without the consent of the defendant, as for instance when he desired to appeal against an order to discontinue, but they were taxed separately.^f Where the costs of an issue of law were set off against the costs of the discontinuance, the *allocatur* was given for the balance.^g

With-
drawal of
cause by
consent.

When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing signed by the *parties*.^h

Discon-
tinuance
after costs
of interlo-
cutory ap-
plication
made costs
in the
cause.

A plaintiff is entitled to make any interlocutory application without prejudice to his right to discontinue under Order 26, r. 1. But where a plaintiff, after succeeding in an interlocutory application, the costs of which were made costs in the cause, gave notice of discontinuance, it was held that the defendant was entitled to his costs, including the costs of such application.ⁱ

Discon-
tinuance
after new
trial
ordered.

In general, under the old procedure, where a plaintiff obtained a rule to discontinue, the defendant was entitled to the whole of his costs. But if after trial, the verdict or nonsuit was set aside and a new trial ordered, and there was no mention of costs in the rule, or if mentioned, the effect would have been that the

^a Marshall 87.

^b Edgington v. Proudman, 1 Dowl. 152.

^c Molling v. Buckholtz, 3 M. & S. 153.

^d Marshall 87; Whitmore v. Williams, 6 T.R. 765.

^e See Order 65, r. 2; also Reg. Gen. H.T. 1853, r. 23; Mayor of Macclesfield v. Gee, 13 M. & W. 470; 14 L.J. Ex. 44; Taylor v. Rolfe, 5 Q.B. 337; 13 L.J. Q.B. 39; Poole v. Grantham, 8 Sc. N.R. 722.

^f Elwood v. Bullock, 6 Q.B. 383; 13 L.J. Q.B. 330.

^g Mayor of Macclesfield v. Gee, 13 M. & W. 470; 2 D. & L. 418; 14 L.J. Ex. 44.

^h Order 26, r. 2; see as to former practice Jolliffe v. Munday, 4 M. & W. 502; 7 Dowl. 225; 8 L.J. Ex. 100.

ⁱ St. Olaf, 2 P.D. 113; 46 L.J. P.A. & D. 74.

defendant, if he succeeded on the second trial, would not have been entitled to the costs of the first, there the defendant was not entitled to the costs of the first trial upon the plaintiff discontinuing.^a The reason suggested was that, if the cause were again to go to trial, and the plaintiff to succeed, these are costs which he would not be entitled to recover, for when a verdict or nonsuit was set aside, the defendant from that time lost any right to the costs of the first trial, and the fact of the plaintiff discontinuing did not set up such a right in the defendant.^b The practice under the Judicature Act in this respect, however, is altered, for where after verdict for the plaintiff a new trial was ordered, unless the plaintiff consented to certain terms on which he would not consent, and there was no mention of costs in the rule, and upon the second trial a verdict was entered for the plaintiff, it was held that the plaintiff was entitled to the costs of the first trial as part of the costs of the action which follow the event.^c It follows, therefore, from this decision that the effect of setting aside a verdict or nonsuit would not be to deprive a defendant of his right to the costs of the first trial, as was formerly the practice, because a defendant, if successful on the second trial, would now be entitled to the costs of the first. Consequently, if the defendant's right to the costs of the trial is not now taken away by a verdict or nonsuit being set aside and a new trial granted, it may be that he is also entitled to the costs of the first trial where the plaintiff discontinues after a rule for a new trial has been granted, although the former practice was different. At all events, a defendant is entitled to the costs of all matters available for the second action, although originally incurred for the purposes of the first action.^d

Costs follow event.

A plaintiff, under the old procedure,^e could not be attached for non-payment of costs where he was allowed to discontinue "upon payment of costs;" for the payment of costs was merely a condition the benefit of which the plaintiff might avail himself of or not, as he might think fit; besides there is no order of the Court to pay them. But wherever the defendant is entitled, as under Order 26, r. 3, to sign judgment for the costs of discontinuance or withdrawal of any part or parts of the plaintiff's claim, and does in fact sign judgment for them, there

Attachment for non-payment of costs of discontinuance.

^a Gray 266; Jolliffe v. Munday, *supra*; Earl of Macclesfield v. Bradley Baddeley, 7 M. & W. 570: 9 Dowl. 312: 10 L.J. Ex. 182.

^b Gray 266.

^c Field v. Great Northern Railway, 3 Ex. D. 261: 47 L.J. Ex. 662.

^d Daniel v. Wilkin, 8 Ex. 156: 22 L.J. Ex. 73.

^e Stokes v. Woodeson, 7 T.R. 6.

the liability on the part of the plaintiff to an attachment for non-payment would arise.

What costs
allowed on
taxation.

A defendant upon taxation of the costs of discontinuance is entitled to the usual costs allowed as between party and party and necessarily incurred for the purpose of defending the action. But where a plaintiff discontinues before giving notice of trial, the defendant is not entitled under any circumstances to any costs of preparing for trial.^a Consequently, he would not be entitled to the costs of instructions for brief, or of drafts or copies of the briefs, or of subpoenas, or of subpoenaing any witnesses, or to any other costs of preparing for trial. Also, a defendant would not be allowed, where a plaintiff discontinues before notice of trial, the costs of preparing for trial, notwithstanding that liberty had been reserved under a judge's order to set down the cause for trial before issue joined.^b

Where, however, the plaintiff gives notice of trial and then discontinues, the defendant will be entitled to all costs properly incurred in preparing for trial, as for instance the costs for preparing briefs, advising on evidence, subpoenaing witnesses, &c.^c

^a *Cooper v. Boles*, 5 H. & N. 188 : 29 L.J. Ex. 141 ; *Doe d. Postlethwaite v. Neale*, 2 M. & W. 732 : 29 L.J. Ex. 141 : 6 Dowl. 166 ; but *see Previte v. Adelaide Fire and Marine Insurance Co.* 32 L.T. N.S. 768.

^b *Curtis v. Platt*, 16 C.B. N.S. 465 : 33 L.J. C.P. 255.

^c *Marshall* 88 ; *see also Rivers v. Hatton*, 8 Dowl. 164 ; *Daniel v. Wilkin*, 8 Ex. 156 : 22 L.J. Ex. 73.

CHAPTER X.

NONSUIT.—NOLLE PROSEQUI.—STET PROCESSUS.

PRIOR to the Judicature Acts, the defendant was entitled, under Nonsuit. the provisions of various statutes,^a to his costs where the plaintiff was nonsuited. A plaintiff, moreover, who submitted to a nonsuit, was entitled to bring another action in respect of the same cause of action. But the rule was different under Order 40, Effect of
nonsuit
under
annulled
Order 40,
r. 6. r. 6, of the annulled Rules of Court, 1875, which provided that any judgment of nonsuit, unless the Court or a judge otherwise directed, was to have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, any judgment of nonsuit might be set aside on such terms as to payment of costs, and otherwise, as to the Court or a judge should seem just.

A plaintiff under that rule was not at liberty to elect to be nonsuited, reserving his right to bring a fresh action in the case of judgment of nonsuit against him, unless the Court or a judge otherwise ordered.

It would seem that the practice in force prior to the Judicature Acts has been revived inasmuch as no provision is made by the Judicature Acts or Rules of Court, 1883, as to the effect of a nonsuit, and Order 72, r. 2, provides "that where no other provision is made by the Judicature Acts or these rules, the present procedure and practice remain in force."

But even supposing that a nonsuit has the effect of a judgment upon the merits for the defendant, it would seem that the plaintiff has a right to appeal from the judgment of nonsuit. Thus, where the nonsuit was upon admitted facts decided by the Judge, he might perhaps have appealed to the Court of Appeal under Order 40, r. 4, of the Rules of the Supreme Court, 1875. But where the nonsuit was not upon the admitted facts, but took place, for instance, at the trial before a Judge

^a 23 Hen. viii. c. 15, s. 1; and 4 Jac. i. c. 3, repealed by 42 & 43 Vic. c. 59, schedule; see also 8 Eliz. c. 2, s. 2; *Cameron v. Reynolds*, Cowp. 407; 2 B. & P. 376; *Davila v. Herring*, 1 Str. 300; *Wilkinson v. Allot*, Cowp. 336.

and jury, the application to set it aside had to be made to the Divisional Court.^a

The costs of a nonsuit would *prima facie* be in the discretion of the Court or judge who tried the case, under the provisions of Order 65, r. 1. But it is suggested that, save in exceptional cases, the old rule, under which the defendant was entitled to costs,^b would be followed, and that in exercising that discretion the Court or judge would be guided in dealing with the costs by analogous decisions so far as those decisions appear reasonable and do not conflict with any statutory provisions or Rules of Court. It is, therefore, proposed to refer to one or two decisions which relate generally to costs of nonsuit. Thus, formerly, where the informer in a penal action was nonsuited, the defendant was entitled to his costs.^c Again, where a plaintiff was nonsuited, the judge had power to certify for a special jury.^d

Nonsuit in
penal ac-
tion.
Certificate
for special
jury where
plaintiff
non-suited.

Nonsuit
after pay-
ment into
Court.
Nonsuit
where there
are several
issues.

Nonsuit
in actions
for re-
covery of
land.

Where the plaintiff was nonsuited after the defendant had paid money into Court, the defendant was entitled to the costs of the whole proceedings from the commencement of the action.^e But if a plaintiff is nonsuited on some issues and succeeds on others, the defendant is entitled to the costs of those issues on which the plaintiff was nonsuited.^f

It would seem that, with one or two exceptions, the costs in actions to recover possession of land are now governed by the rules regulating the costs in ordinary actions.^g A defendant, therefore, would be entitled to his costs where the plaintiff is nonsuited, unless the Court or a judge in the exercise of the discretion over costs given by Order 65, r. 1, were to deprive him of them. Thus it was provided by r. 29 of Reg. Gen., T.T., 1853, that if a plaintiff in ejectment be nonsuited at the trial, the defendant shall be entitled to judgment for his costs of suit.^h

Setting
aside non-
suit.

Formerly, where a nonsuit was set aside upon payment of costs, such payment was a condition precedent to the setting

^a *Etty v. Wilson*, 3 Ex. D. 359 : 47 L.J. Ex. 664. As to practice and circumstances under which a Judge before the Judicature Acts was bound to nonsuit see Roscoe on Evidence, *tit.* "nonsuit."

^b *Cameron v. Reynolds*, Cowp. 407.

^c 18 Eliz. c. 5, s. 3 ; see also *Wilkinson*, q. t. v. Allot, Cowp. 366.

^d 3 & 4 Will. iv. c. 42, s. 35, now repealed by 42 & 43 Vic. c. 59 ; schedule

^e Dax 27 : *Marshall* 103 ; *Rumbelow v. Whalley*, 16 Q.B. 401 : 20 L.J. Q.B. 262.

^f *Abbott v. Andrews*, 8 Q.B. D. 648 : 51 L.J. Q.B. 641.

^g *Wilson's Judicature Acts* (ed. 4), p. 175.

^h 4 Jac. i. c. 3, which originally gave a defendant his costs where the plaintiff was non-suited, is now repealed by 42 & 43 Vic. c. 59, schedule.

aside of the nonsuit, and until the costs were paid, the plaintiff could not proceed to another trial.^a

As a *nolle prosequi*, and in some cases a *stet processus*, may still sometimes be entered, although, as a rule, proceedings will be taken under Order 26 to discontinue the whole or part only of an action, the question as to the costs of these two modes of proceeding will be very shortly referred to.

A *nolle prosequi* is in the nature of an acknowledgment or *Nolle* undertaking by the plaintiff, entered on the record, to forbear *prosequi*. to proceed any further, either in the suit altogether or as to some part of it, or as to some of the defendants.^b

The effect of entering a *nolle prosequi* to any part of the plaintiff's demand before trial, is to withdraw that portion of his claim altogether from the consideration of the jury, and to leave it so entirely unaffected by the verdict, as to entitle him to bring a fresh action in respect of it.^c

If a plaintiff entered a *nolle prosequi* as to the whole of his claim, the defendant was entitled to costs in the same manner as upon a discontinuance; and where a *nolle prosequi* was entered as to part only of the plaintiff's claim, or as to some of the defendants, if more than one, the defendant as to whom it was entered was entitled to costs.^d

Where formerly the defendant paid money into Court as to some only of the causes of action, or as to part of the sum claimed by the plaintiff, and pleaded as to the residue, a plaintiff who accepted the money in satisfaction of the causes of action, or of the issues as to which it was paid, and entered a *nolle prosequi* as to the residue, was entitled to the costs as to that part of the cause of action as to which money had been paid into Court, including the costs of the writ, &c., and the defendant was entitled to the costs of the pleas other than the plea of payment into Court.^e

A *stet processus* was an entry on the roll to the effect that by consent of the parties all further proceedings in the action be stayed.^f Unless ordered by the Court, or consented to, neither party was entitled to costs. Though it could not be entered without consent, the Court in some cases, where justice required

^a *Nichols v. Bozon*, 13 East. 185.

^b Archb. Pr. 1201 (ed. 13).

^c Marshall 90; *Amos v. Cuthbert*, 3 M. & G. 1.

^d Archb. Pr. 1203; see also 8 Eliz. c. 2, s. 2, and 3 & 4 Will. iv. c. 42, ss. 32, 33; but ss. 32 and 33 of the latter statute are now repealed by 42 & 43 Vic. c. 59, schedule.

^e Marshall 93; *Goodee v. Goldsmith*, 2 M. & W. 202: 5 Dowl. 288; *Williams v. Sharwood*, 3 Bing. N.C. 331: 3 Scott 761.

^f *Quarrington v. Arthur*, 11 M. & W. 491.

that a *stet processus* should be entered, would refuse to aid a party in any application he might make in the course of the cause over which they had any discretion, unless he did so consent.^a

^a Marshall 96, citing *Holland v. Henderson*, 4 M. & W. 587 : 8 L.J. Ex. 147 ; *Smith v. Badcock*, 5 Dowl. 91.

CHAPTER XI.

JUDGMENT BY DEFAULT (1) OF APPEARANCE, (2) OF
PLEADING.

I.—DEFAULT OF APPEARANCE.

By *Order 3, r. 6*, in all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (*a*) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or (*b*) on a bond or contract under seal for payment of a liquidated amount of money; or (*c*) on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (*d*) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (*e*) on a trust; or (*f*) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant; the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled.*

By *Order 13, r. 3*, where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants, if more than one, fail to appear thereto, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, or if no rate be specified, at the rate of five per cent. per annum, to the date of the judgment, and costs.

So also by rule 4, where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and there

* For forms of special indorsements see R.S.C. 1883, Appendix C, sec. iv.

are several defendants, of whom one or more appear to the writ and another or others of them fail to appear, the plaintiff may enter final judgment, as in rule 3, against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with his action against such as have appeared. A plaintiff under this rule is entitled to sign final judgment for want of appearance, with costs, and to issue execution immediately against one or more of several defendants who fail to appear to the writ.^a

Formerly, if one of several defendants allowed judgment to go by default, where the writ of summons was specially indorsed under section 33 of the Common Law Procedure Act, 1852, the plaintiff was entitled to sign judgment and to issue execution thereupon, but he was taken to have abandoned his action against the other defendants who had appeared.^b But now his right to proceed against such as have appeared is not prejudiced.

Claim for
detention
of goods
and pecu-
niary dam-
ages.

Writ of
inquiry to
issue.

Excep-
tion.

Where
several
defendants
to writ in-
dorsed for
detention
of goods
and pecu-
niary dam-
ages.

By *Order 13, r. 5*: Where the writ is indorsed with a claim for detention of goods and pecuniary damages, or either of them, and the defendant fails, or all the defendants, if more than one, fail to appear, the plaintiff may enter interlocutory judgment, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the Court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way which the Court or judge may direct.

By *rule 6*: Where the writ is indorsed as in the last preceding rule mentioned, and there are several defendants, of whom one or more appear to the writ, and another or others of them fail to appear, the plaintiff may sign interlocutory judgment against the defendant or defendants so failing to appear, and the value of the goods and the damages, or either of them, as the case may be, may be assessed as against the defendant or defendants suffering judgment by default, at the same time as the trial of the action or issue therein against the other defendant or defendants, unless the Court or a judge shall otherwise direct. Provided that the Court or a judge may order that, instead of a writ of inquiry or trial, the value and amount of damages,

^a See forms of judgments, R.S.C. 1883, Appendix F, form 1, which is in the form of judgment for the plaintiff for the amount specially indorsed "*and costs to be taxed*;" and see form 2.

^b 15 & 16 Vic. c. 76, s. 33; see also Marshall 75, 76 as to the former practice.

or either of them, shall be ascertained in any way which the Court or a judge may direct.

By *rule 7* : Where the writ is indorsed with a claim for detention of goods and pecuniary damages, or either of them, and is further indorsed for a liquidated demand, whether specially or otherwise, and any defendant fails to appear to the writ, the plaintiff may enter final judgment for the debt or liquidated demand, interest, and costs, against the defendant or defendants failing to appear, and interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in such of the preceding rules of this Order as may be applicable.

Claim for detention of goods, &c., and also for liquidated demand.

Under the old practice, if the amount claimed by the plaintiff was uncertain, the writ of inquiry had to be first executed by the plaintiff before the judgment was completed, and before he was in a position to tax his costs.^a

Writ of inquiry to be executed before taxation of costs.

By *Order 13, r. 8* : In case no appearance shall be entered in an action for the recovery of land, within the time limited by the writ for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply; and by *rule 9*, where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, he may enter judgment as in *rule 8* mentioned for the land, and may proceed as in the other preceding rules of this Order mentioned as to such other claim so indorsed.

Action for recovery of land.

Claim for mesne profits, arrears of rent, &c., and land.

Where judgment is signed for default of appearance, in an action for the recovery of land only, the plaintiff is not entitled to judgment for his costs.^b Formerly, if after such judgment by default an action was brought against the same defendant for the mesne profits, it was usual for the plaintiff to recover the costs incurred in the action for the recovery of the land as consequential damages as well as the mesne profits.^c

Plaintiff not entitled to costs on default of appearance

By *Order 13, r. 14* : Where the writ is indorsed with a claim on a bond, within 8 & 9 Will. iii. c. 11, and the defendant

Claim on bond.

^a Dax 166, citing *Weald v. Brown*, 2 Cr. & J. 672.

^b See also *ante* p. 45, chap. 4, *iii.* "costs in action for recovery of land"; Gray 196: *Marshall* 370: 15 & 16 Vic. c. 76, s. 177. See also form of judgment in default of appearance in action for recovery of land, R.S.C. 1883, Appendix F, form 3, where no mention of costs is made.

^c *Marshall* 370, 482: Dax 167; *Gulliver v. Drinkwater*, 2 T.R. 261; *Symonds v. Page*, 1 C. & J. 29.

fails to appear thereto, no statement of claim shall be delivered and the plaintiff may at once suggest breaches by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the said statute, and in 3 & 4 Will. iv. c. 42 s. 16.

The mode of proceeding under these statutes is by a writ of inquiry to assess the damages claimed by reason of the suggested breaches. Under section 16 of the later statute the inquiry may, by order of the Court, be executed "before the justice or justices of Assize or Nisi Prius" of the county where the action is pending.

Setting
aside judg-
ment in
default of
appear-
ance.

By *rule 10*: Where judgment is entered pursuant to any of the preceding rules of *Order 13*,^a it shall be lawful for the Court or a judge to set aside or vary such judgment upon such terms as may be just.^b

The following sums have been hitherto allowed under the Practice Masters' Rules as the costs payable on a judgment for default of appearance :^c—

	£	s.	d.
In town cases	3	14	0
In country and agency cases and cases in which service effected beyond five miles from General Post Office, St. Martin's-le-Grand	4	6	0
And 6s. in addition for each service beyond one defendant.			

(The above allowances include all mileage).

II.—DEFAULT OF PLEADING.

Applica-
tion to dis-
miss action
for want of
prosecu-
tion.

Where a plaintiff, being bound to deliver a statement of claim fails to do so within the time allowed for that purpose, the defendant may apply, by summons at chambers for an order that the action be dismissed with costs. Thus, by *Order 27, r. 1* it is provided that if the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or judge may, if no statement of claim shall have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as the Court or judge shall think just.

^a Rule 14 would seem to be excluded as it precedes rule 10, although here inserted before it for the sake of convenience.

^b As to practice on signing judgment on default of appearance in the High Court and in a District Registry *see* *Order 13*, rules 2 and 11.

^c *See post*, Appendix.

The costs to be paid to the defendant by the plaintiff are costs "to be taxed."^a

In general, if the plaintiff's claim is only for a debt or liquidated demand, and the defendant does not within the time allowed for that purpose deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed^b with costs (Order 27, r. 2).

So again, where in any such action, as in rule 2 mentioned, there are several defendants, if one of them make default as mentioned in rule 2, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants (Order 27, r. 3). A plaintiff who proceeded under this rule would be entitled to his taxed costs.^c

Where several defendants, and one makes default.

Under the old procedure, if a defendant, although he had made default in delivering a pleading within the time allowed for that purpose, subsequently delivered the pleading, but before the plaintiff had signed judgment for want of a plea, the plaintiff could not afterwards sign judgment.^d

Delivery of defence by defendant making default, but before judgment signed.

Execution on judgment by default is the same as in ordinary cases.

Execution on judgment by default.

If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant, or all the defendants if more than one, make default as mentioned in rule 2, the plaintiff may enter an *interlocutory* judgment against the defendant, or defendants, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be. But the Court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which the Court or judge may direct (Order 27, r. 4).

Default by defendant where claim for unliquidated damages.

When in any such action, as in rule 4 mentioned, there are several defendants, if one or more of them make default as mentioned in rule 2, the plaintiff may enter an *interlocutory* judgment against the defendant or defendants so making default, and proceed with his action against the others. And in such case the value and amount of damages against the defendant making default shall be assessed at the same time with the trial

Default by one or more of several defendants.

^a See R.S. C. 1883, Appendix F, form 1.

^b As to signing final judgment for amount for which a replevin bond is given see *Dix v. Groom*, L.R. 5 Ex. 91 : 49 L.J. Ex. 430.

^c See form of judgment on default of defence in case of liquidated demand, R.S.C. 1883, Appendix F, form 1.

^d Archb. Pr. (ed. 13) 795.

of the action or issues therein against the other defendants, unless the Court or a judge shall otherwise direct (Order 27, r. 5). This rule does not in terms give the plaintiff his costs as against the defaulting defendant,^a and it would seem that such costs would be costs within the discretion of the Court or a judge under Order 65, r. 1, and that the plaintiff would not be entitled under the County Courts Act, 1867, s. 5, to such costs, where he recovered less than £20 in contract or £10 in tort, in the absence of a certificate or order.

Claim for liquidated and unliquidated damages.

Again, if the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and any defendant make default, as mentioned in rule 2, the plaintiff may enter *final* judgment for the debt or liquidated demand, and also enter *interlocutory* judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in rules 4 and 5 *supra* (Order 27, r. 6).^b

Default in action for recovery of land.

In an action for the recovery of land, if the defendant makes default as mentioned in rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs (Order 27, r. 7).

Mesne profits.

Also where the plaintiff has endorsed a claim for mesne profits, arrears of rent, or double value in respect of the premises claimed, or any part of them, or damages for breach of contract, upon a writ for the recovery of land, if the defendant makes default as mentioned in rule 2, or if there be more than one defendant, some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants, and proceed as mentioned in rules 4 and 5 (Order 27, r. 8).

Final or interlocutory judgment for part of claim unanswered.

If the plaintiff's claim be for a debt or liquidated demand, the detention of goods and pecuniary damages, or for any of such matters, or for the recovery of land, and the defendant delivers a defence which purports to offer an answer to part only of the plaintiff's alleged cause of action, the plaintiff may by leave of the Court or a judge enter judgment, final or interlocutory, as the case may be, for the part unanswered ; provided

^a See R.S.C. 1883, Appendix F, form 2, which does not mention costs.

^b It would seem that in this case only one judgment is necessary. Thus, under the Practice Masters' Rules of 1880, 1881, and 1882, it was settled that in cases where the plaintiff is entitled to a final judgment as to part of his claim, and to an interlocutory judgment as to the remainder, one judgment only is necessary, final as to part and interlocutory as to the rest, and one fee paid.

that the unanswered part consists of a separate cause of action, or is severable from the rest, as in the case of a part of a debt or liquidated demand ; provided also that where there is a counter-claim, execution on any such judgment as above mentioned in respect of the plaintiff's claim shall not issue without leave of the Court or a judge (Order 27, r. 9).

Execution on judgment by default not to issue, where counter-claim without leave.

In all other actions than those already mentioned, or Probate actions,^a if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim, the Court or a judge shall consider the plaintiff to be entitled to (Order 27, r. 11). So also where, in any such action as mentioned in rule 11, there are several defendants, then if one of such defendants makes such default as aforesaid, the plaintiff may either (if the cause of action be severable) set down the action *at once*, on motion for judgment against the defendant so making default, or may set it down against him *at the time when it is entered for trial*, or set down on motion for judgment against the other defendants (Order 27, r. 12). The costs of obtaining judgment against the defaulting defendant would be dealt with by the Court in the usual manner under the powers given by Order 65, r. 1, upon the hearing of the motion for judgment under rules 11 and 12.

In other actions motion for judgment. Default by one of several defendants.

Any judgment by default, whether under Order 27 or upon any other of these rules, may be set aside by the Court or a judge upon such terms as to costs or otherwise as such Court or judge may think fit (Order 27, r. 15).

Setting aside judgment by default.

Execution on judgment by default is the same as in ordinary cases.

Execution on judgment by default.

^a See Order 27, r. 10.

CHAPTER XII.

I.—STAYING PROCEEDINGS ON PAYMENT OF DEBT OR LIQUIDATED DEMAND AND COSTS.

Indorse-
ment of
debt or
liquidated
demand.

Costs may
be taxed.

BY Order 3, r. 7: "Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, besides stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state that upon payment thereof within four days after service, or in case of a writ not for service within the jurisdiction within the time allowed for appearance, further proceedings will be stayed.^a The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation."

This rule is similar to, and the statement to be indorsed upon the writ is the same as, that provided by the Common Law Procedure Act, 1852, s. 8.

Indorse-
ment obli-
gatory-

The indorsement, which is obligatory, is to be used only where there is a debt or liquidated demand; it is not necessary where the plaintiff claims unliquidated damages, or damages and debt.^b The object of the indorsement is merely to give the defendant an opportunity of paying the amount claimed within four days after service.

Amend-
ment of in-
dorsement.

If the writ has been improperly indorsed the plaintiff is in general allowed to amend the same upon payment of the costs of the application, and then the defendant has four more days from the date of the amendment in which to pay the full debt and costs.^c

Staying
proceed-
ings.

If the plaintiff claims on his writ more than he is entitled to, the defendant may nevertheless obtain a stay of proceedings

^a For statement *see* R.S.C. 1883, Appendix A, part iii. sec. iii.

^b *Perry v. Patchett*, 2 Dowl. 667.

^c *See* Archb. Pr. 224 (ed. 13); *Jacquot v. Bourra*, 5 M. & W. 156.

upon payment of what is really due, and the costs of the writ.^a

But if the amount be not paid within the four days, the plaintiff is allowed to proceed for a further amount.^b

A defendant is entitled to tax the costs where a plaintiff has waived payment within the four days required by the rule, by accepting from the defendant, after four days from the date of the service, payment of the full amount indorsed on the writ of summons, without any agreement as to taxation of costs.^c

Costs may be taxed even where plaintiff avoids payment within four days.

Where the amount claimed for costs is excessive, the defendant may pay the amount claimed, and after the costs have been taxed recover back the excess; or he may take out a summons to stay the action on payment of the amount claimed and a less sum for costs.^d

Excessive amount claimed by plaintiff.

Under Reg. Gen. H. T. 1853, r. 24, the acceptor of a bill of exchange, or the maker of a promissory note, was entitled to a stay of proceedings upon payment of debt and costs in that action only; ^e so also, in an action on a bond under 4 & 5 Anne, c. 16, s. 13, or on a bond conditioned for the payment of mortgage money, or for the performance of covenants in a mortgage deed, under 7 Geo. ii. c. 20, s. 1.^f Where, in ejectment by a mortgagee, the mortgagor under the Common Law Procedure Act, 1852, s. 219, brings the principal including interest and costs into Court, that is to be deemed a full satisfaction, and the Court can compel the mortgagee to recovery, and of course will stay the proceedings. The costs to be paid under this section are taxed as between party and party, and not as between solicitor and client.^g

Staying proceedings in action on bill; in action on bond;

in ejectment by mortgage.

The proceedings in an action on a judgment have generally been stayed on payment of the amount of the judgment and costs.^h

In action on judgment.

In order to obtain a stay of proceedings the defendant must take out a summons to stay, if the plaintiff decline to accept the money offered, and then the defendant by paying the money into Court may throw upon him the whole risk of being liable

Practice as to mode of obtaining stay of proceedings.

^a *Elliston v. Robinson*, 2 Dowl. 241; *Wyllie v. Phillips*, 3 Bing. N.C. 776; 5 Dowl. 644; *Hodding v. Starchfield*, 7 M. & G. 957; 8 Sc. N.R. 662.

^b *Bowditch v. Slaney*, 4 Dowl. 140; 2 Bing. N.C. 142.

^c *Hoole v. Earnshaw*, 39 L.T. N.S. 409.

^d *Wilson's Judicature Acts*, 179 (ed. 4).

^e See also *Randall v. Moon*, 21 L.J. C.P. 226; *Goodwin v. Cremer*, 25 L.J. Ex. 30.

^f As to the practice see Archb. Pr. 1102 (ed. 13).

^g *Doe d. Cupps v. Cupps*, 3 N.C. 768.

^h *Simpson v. Stone*, 2 W.Bl. 785.

The same may be allowed for costs. for the costs incurred subsequent to the refusal of the offer, should he afterwards accept the same or finally recover no more.^a The payment of the money into Court is a condition precedent to the right of the defendant to make the plaintiff liable for such costs.^b The conduct of the plaintiff, however, is open to explanation.^c If the defendant does not pay the money into Court the plaintiff, if successful at the trial, is entitled to costs as in ordinary cases.^d But where a defendant is entitled to the costs incurred subsequent to the refusal of the offer, he may set them off against any costs to which the plaintiff is entitled,^e notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought.

It seems that the defendant may have the costs taxed although he has paid a less sum than that indorsed upon the writ.^f

Fixed sum may be allowed for costs. By Order 65, r. 27 (38), where a party is entitled to sign judgment for his costs, the master in taxing the costs may allow a fixed sum for the costs of the judgment.

II.—LEAVE TO SIGN JUDGMENT OR DEFEND WHERE WRIT SPECIALLY INDORSED.

Final judgment under Order 14, r. 1, generally. The plaintiff may under Order 14, r. 1, where the defendant appears to a writ of summons specially indorsed under Order 3, r. 6, apply to a judge for liberty to enter final judgment for the amount so indorsed, together with interest if any and costs.

In action for recovery of land. A like application may be made where the writ is indorsed for the recovery of land (with or without rent or mesne profits), as the case may be. Upon any judgment or order for the recovery of any land and costs, there may be either one writ, or separate writs of execution for the recovery of possession and for the costs at the election of the successful party (Order 47, r. 3).

Application now made. The application for final judgment under Order 14 must be on affidavit made by the plaintiff himself, or by any other person

^a Marshall, 78.

^b *Watson v. Coleman*, 7 M. & G. 424; *Clark v. Dann*, 3 D. & L. 513; *Gover v. Elkin*, 3 M. & W. 216; 7 L.J. Ex. 72.

^c *Ackroyd v. Read*, 5 M. & W. 542.

^d *Hore v. Saxl*, 17 C.B. 599.

^e *James v. Raggett*, 2 B. & Ald. 776; and see also R.S.C. 1883, Order 65, r. 14.

^f *Hunter v. Russell*, 5 M. & G. 601; 6 Sc.N.R. 627; but see *Young v. Crompton*, 2 D. & L. 557.

who can swear positively to the facts. The affidavit must verify the cause of action and the amount of the claim, if any, and must state that in the deponent's belief there is no defence to the action.

The application is, under rule 2, to be made by summons returnable not less than four clear days after service, accompanied by a copy of the affidavit and exhibits referred to therein.

The judge or master at chambers may make an order empowering the plaintiff to enter judgment accordingly, unless the defendant, by affidavit or otherwise, satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend (rule 1).

Order to be made if no defence on merits.

The defendant may, under rule 3, show cause against the application by affidavit or (except in actions for the recovery of land) by offering to bring into Court the sum indorsed upon the writ. The affidavit must state whether the defence alleged goes to the whole or to part only, and, if so, to what part of the plaintiff's claim.

No order if defendant brings into Court amount indorsed on writ.

The judge may, if he think fit, order the defendant, or, in the case of a corporation, any officer thereof, to attend and be examined upon oath; or to produce any leases, deeds, books, or documents, or copies of or extracts therefrom.

Order for examination of defendant or officer of corporation.

Also by rule 4, if it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.*

Judgment for part of claim.

By rule 5, if it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

Leave to one of several defendants to defend.

And by rule 6, leave to defend may be given unconditionally or subject to such terms as to giving security, or time and mode

Terms on which leave to defend given.

* See *Dennis v. Seymour*, 4 Ex. D. 80.

of trial (in cases which, under these rules, may be tried without a jury) or otherwise, as the judge may think fit.

A successful defendant is entitled, where money has been paid into Court, to take it out, notwithstanding that notice of appeal has been given.^a

- *Yorkshire Banking Co. v. Beatson*, 4 C.P. D. 213.

CHAPTER XIII.

PARTIES GENERALLY.

By Order 16, r. 1, all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge *in disposing of the costs* shall otherwise direct.

Claims by plaintiffs jointly, severally, or in alternative.

Where two persons were joined as plaintiffs in an action and one was unsuccessful, it has been held that the successful plaintiff was chargeable with the costs of joining the unsuccessful plaintiff.*

Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just (r. 2).

Substitution of real for wrong plaintiff.

Where in an action any person has been improperly or unnecessarily joined as a co-plaintiff, and a defendant has set up a counterclaim or set-off, he may obtain the benefit thereof by establishing his set-off or counterclaim as against the parties other than the co-plaintiff so joined, notwithstanding the misjoinder of such plaintiff or any proceeding consequent thereon (r. 3).

Misjoinder of plaintiff where counterclaim set up.

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be

Joinder of defendants where claim joint, several, or in alternative.

* *Dhormasjee v. Grey*, 52 L.J. Q.B. 192.

liable, according to their respective liabilities, without an amendment (r. 4).

Defendant
not wholly
interested.

It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a judge may make *such order as may appear just* to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest (r. 5).

Defendants
liable sever-
ally, or
jointly and
severally,
may be
joined.

The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes (r. 6).

Joinder of
two de-
fendants
where
plaintiff in
doubt.

Where the plaintiff is in doubt as to the person from whom he is entitled to redress he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent may be determined as between all parties (r. 7).

A plaintiff who joined several defendants in the alternative would run the risk of having to pay the costs of those against whom he did not succeed, in the event of being successful against some or one only of the defendants so joined.^a

Misjoinder
or non-
joinder of
parties.

No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in *controversy* so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings either upon or without the application of either party, and *on such terms as may appear to the Court or a judge to be just*, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added (Order 16, r. 11).

Adding
parties.

No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the

^a As to the practice in the Chancery Division see *Child v. Stenning*, Ch. D. 695 : 46 L.J. Ch. 523 : 7 Ch. D. 413 : 47 L.J. Ch. 371.

proceedings as against such party shall be deemed to have begun only on the service of such writ or notice (Order 16, r. 11).

Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner (r. 12).

When application may be made.

In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party, or be served with notice in such manner and form as hereinafter prescribed, and on such terms as the Court or judge shall think just, and shall make such order for the disposal of the cause or matter as may be just (Order 17, r. 2).

Change of Parties by marriage, death, &c.

Subject to the following rules of this order, the plaintiff may unite in the same action several causes of action, but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof (Order 18, r. 1).

Joinder of several causes of action.

No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits, or arrears of rent, or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed (r. 2).

By leave only in action for recovery of land.

Claims by a trustee in bankruptcy as such shall not, unless by leave of the Court or a judge, be joined with any claim by him in any other capacity (r. 3).

Claim by trustee.

Claims by or against husband and wife may be joined with claims by or against either of them separately (r. 4).

By or against husband and wife.

Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (r. 5).

By or against executor.

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant (r. 6).

Joint and several claims.

The last three preceding rules shall be subject to rules 1, 8, and 9 of this Order (r. 7).

Applica-
tion to
sever
claims.

Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the Court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of together (r. 8).

Order to be
made if
joinder in-
convenient.

If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or a judge that the causes of action are such as cannot all be conveniently disposed of together, the Court or judge may order any of such causes of action to be excluded, and consequential amendments to be made, and *may make such order as to costs as may be just* (r. 9).

THIRD PARTY PROCEDURE.

Leave to
serve third
party with
notice.

A defendant who claims to be entitled to contribution or indemnity over against any person not a party to the action, may by leave of the Court or judge issue a notice, called a "third party notice," to that effect, stamped with the seal with which writs of summons are sealed. A copy of the notice must be filed with the proper officer and served on the person according to the rules relating to the service of writs of summons.

Contents of
notice.

The notice must state the nature and grounds of the claim, and must, unless otherwise ordered by the Court or a judge, be served within the time limited for delivering his defence.

Form of
notice.

The action may be in the form or to the effect of the form No. 1 in Appendix B, to the R. S. C. 1883, with such variations as circumstances may require, and therewith must be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action (Order 16, r. 48).^a

Appear-
ance by
third
party.

If a person not a party to the action, who is served as mentioned in rule 48, and called the "third party," desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, or his own

^a As to decisions on the corresponding rule of R.S.C. 1875, see *Bower v. Hartley*, 1 Q.B. D. 652; *Swansea Shipping Co. v. Duncan*, 1 Q.B. D. 644; 45 L.J. Q.B. 638; *Horwell v. London Omnibus Co.* 2 Ex. D. 365, 369; 4 L.J. Ex. 700; *Benecke v. Frost*, 1 Q.B. D. 419; 45 L.J. Q.B. 693; *Fowler v. Knoop*, 36 L.T. N.S. 269; *Weekly Notes*, 1877, p. 68; also *Jud. Act*, 1876, s. 24 (3); *The Yorkshire Waggon Co. v. Newport Coal Co.* 5 Q.B. D. 268; 49 L.J. Q.B. 527; *De Hart v. Stevenson*, 1 Q.B. D. 313; 45 L.J. Q.B. 5755; *Williams v. S.E.R. Co.* 26 W.R. 352; *Norris v. Beazley*, 46 L.J. C.P. 513.

liability to the defendant, the third party must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice. Provided always, that a person so served and failing to appear within the said period of eight days, may apply to the Court or a judge for leave to appear, and such leave may be given *upon such terms, if any, as the Court or judge shall think fit* (Order 16, r. 49).

Default of third party admits judgment against defendant.

Where a third party makes default in entering an appearance in the action, in case the defendant giving the notice suffer judgment by default, he shall be entitled at any time, after satisfaction of the judgment against himself, or before such satisfaction by leave of the Court or a judge, to enter judgment against the third party, to the extent of the contribution or indemnity claimed in the third party notice; provided that it shall be lawful for the Court or a judge to set aside or vary such judgment upon such terms as may seem just (r. 50).

Judgment by default of third party and defendant.

Where a third party makes default in entering an appearance in the action, in case the action is tried and results in favour of the plaintiff, the judge who tries the action may, at or after the trial, enter such judgment as the nature of the case may require for the defendant giving the notice against the third party; provided that execution thereof be not issued without leave of the judge until after satisfaction by such defendant of the verdict or judgment against him. And if the action is finally decided in the plaintiff's favour, otherwise than by trial, the Court or a judge may, on application by motion or summons, as the case may be, order such judgment as the nature of the case may require to be entered for the defendant giving the notice against the third party at any time after satisfaction by the defendant of the amount recovered by the plaintiff against him (r. 51).

Default by third party, and plaintiff successful subsequently.

If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court or a judge for directions, and the Court or judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or judge may direct; and, if not so satisfied, may order such judgment as the

Trial of questions as between defendant and third party.

nature of the case may require to be entered in favour of the defendant giving the notice against the third party (Order 16, r. 52).

Leave to
third party
to defend
action or
appear at
trial.

The Court or a judge, upon the hearing of the application mentioned in rule 52, may, if it shall appear desirable to do so, give the third party liberty to defend the action, upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the Court or judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action (r. 53).

Costs.

The Court or a judge may decide all questions of costs, as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other or others, or give such direction as to costs as the justice of the case may require (r. 54).^a

Notice to
co-defend-
ant treated
as third
party.

Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued, and the same procedure shall be adopted, for the determination of such questions between the defendants as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action (r. 55).

Third party
costs.

Under the annulled Rules of Court, 1875, it was held, and the rules do not appear to affect the decision, that the High Court has jurisdiction to order a third party to pay to the unsuccessful defendant the costs payable by such defendant to the plaintiff. Those costs are costs of proceedings which are in the discretion of the Court, and consequently there is no appeal, by reason of section 49 of the Judicature Act, 1873, against an order dealing with them.^b

A defendant may be ordered to pay the costs of a third party in an action which has been settled.^c

^a This rule seems intended to meet a decision to the effect that no power was given to impose terms as to the payment of costs of a party who had been brought in upon an application under the old rule which corresponds with the present r. 52; *Yorkshire Waggon Co. v. Newport Coal Co.* 5 Q.B. D. 268 : 49 L.J. Q.B. 527; but see also r. 53.

^b *Hornby v. Cardwell*, 8 Q.B. D. 329 : 51 L.J. Q.B. 89; see also *Jud. Act, 1873, s. 24 (3)*; *Howard v. Lovegrove*, L.R. 6 Ex. 43 : 40 L.J. Ex. 13.

^c *Dawson v. Shepherd*, 49 L.J. Ex. 529; *contra Yorkshire Waggon Co. v. Newport Coal Co.* 5 Q.B. D. 268 : 49 L.J. Q.B. 527; see also *Witham v. Vane*, 42 L.T. N.S. 686 : 44 L.T. N.S. 718.

CHAPTER XIV.

COSTS OF VARIOUS MATTERS WHICH DO NOT DEPEND UPON THE EVENT OF THE ACTION.

THE Court or a judge has an absolute discretion as to the costs of amending any indorsement or pleading. Amend-ments.

Thus by Order 28, r. 1: "The Court or a judge may at any stage of the proceedings allow either party to alter or amend his indorsement or pleadings in such manner and *on such terms as may be just*, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." Indorse-ments and pleadings may be amended upon terms at any time.

By rule 2: "The plaintiff may without any leave amend his statement of claim whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply, and before replying, or where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared." Plaintiff may amend once without leave, or within four weeks where no defence.

By rule 3: "A defendant who has set up any counterclaim or set-off may without any leave amend such counterclaim or set-off at any time before the expiration of the time allowed him for answering the reply, and before such answer or in case there be no reply, then at any time before the expiration of twenty-eight days from defence." Defendant may amend counter-claim without leave.

By rule 13: "The costs of and occasioned by any amendment made pursuant to rules 2 and 3 of this Order shall be borne by the party making the same, unless the Court or a judge shall otherwise order." Costs of amend-ment.

By rule 4: "Where any party has amended his pleading under either of the last two preceding rules, the opposite party may within eight days after the delivery to him of the amended pleading apply to the Court or a judge to disallow the amendment or any part thereof, and the Court or judge may, if satisfied that the justice of the case requires it, disallow the same or allow it, *subject to such terms as to costs or otherwise as may be just*." Rule 5 allows counter amendments to be made. Amend-ment may be dis-allowed.

By rule 6: "In all cases not provided for by the preceding Amendments may

be made at rules of this Order, application for leave to amend may be made time on by either party to the Court or a judge or to the judge at the terms as to trial of the action, and such amendment may be allowed *upon costs.* *such terms as to costs* or otherwise as may seem just."

General By rule 12: "The Court or a judge may at any time and *on power to amend such terms as to costs or otherwise* as the Court or judge may upon terms think just, amend any defect or error in any proceedings, and as to costs. all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

Power to The terms upon which in some cases a judge allow an amend- award lump sum in lieu of costs. ment might be upon payment of a lump sum in lieu of costs. The power to make such an order is given by Order 65, r. 23, which provides that "upon interlocutory applications, where the Court or a judge shall think fit to award costs to any party, the Court or judge may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross shall be paid."

Amend- With regard to striking out or amending any indorsement or ment of un- pleading on the ground that it is unnecessary, scandalous, &c., necessary or scandalous plead- it is provided by Order 19, r. 27 that "The Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if they or he shall think fit, order the costs of the Costs. application to be paid as between solicitor and client."

Costs of amend- By Order 65, r. 27, regulation 31, "where the plaintiff is directed ment by plaintiff, where plaintiff pays costs. to pay to the defendant the costs of the cause, the costs occasioned to a defendant by any amendment of the plaintiff's pleadings shall be deemed to be part of such defendant's costs in the cause (except as to any amendment which shall appear to have been rendered necessary by the default of such defendant); but there shall be deducted from such costs any sum which may have been paid by the plaintiff according to the course of the Court at the time of any amendment."

Costs of un- And by regulation 32, where upon taxation a plaintiff who necessary amend- has obtained a judgment with costs is not allowed the costs of ment by plaintiff, where plaintiff pays costs. any amendment of his pleadings on the ground of the same having been unnecessary, the defendant's costs occasioned by such amendment shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff."

Amend- By Order 28, r. 11: "Clerical mistakes in judgments or orders, ment of clerical mistakes, or errors arising therein from any accidental slip or omission,

may at any time be corrected by the Court or a judge on motion or summons without an appeal."

An amendment is generally allowed only "on payment of costs." The payment of the costs of the amendment is a condition precedent, which must be fulfilled; and formerly if the party proceeded without paying them, the proceedings were set aside for irregularity.^a It is optional for the party to act upon or abandon the order.^b Terms upon which amendments generally allowed.

When an amendment is allowed during the course of a cause "on payment of costs" it means the costs really and substantially occasioned by the amendment. In taxing such costs, therefore, the master will allow the proper costs of all such proceedings as have been rendered useless by reason of the amendment. The costs of proceedings, as amended, are costs in the cause as if they had been originally framed as amended.^c What costs allowed.

In other words, the costs of an amendment are the costs anterior or prior to the amendment and include all costs which have been thrown away by reason of the amendment; but the costs consequent on and subsequent to the amendment depend upon the result of the action, *i.e.*, are costs in the cause.

In one case, before the Judicature Acts, it was decided that a party was not entitled to the costs of an amendment at the trial where it appeared that he had not been misled by the pleading as to the matter in dispute.^d

If a party who has obtained an order for leave to amend does not amend within the time limited for that purpose by the order, or if no time is limited then within fourteen days from the date of the order, such order to amend shall on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void unless the time is extended by the Court or a judge (Order 28, r. 7). Period during which order to amend is in force.

By Order 20, r. 1, sub-clause E, where the plaintiff delivers a statement of claim without being required to do so, or the defendant unnecessarily requires such statement, the Court or a judge may make such order *as to the costs occasioned thereby* as shall be just, if it appears that the delivery of a statement of claim was unnecessary or improper. Costs of unnecessary statement of claim and notices.

But a statement of claim must state specifically the relief which the plaintiff claims, either simply or in the alternative, and it is not necessary to ask for general or other relief, which Relief sought to be stated specifically in claim.

^a Wall v. Lyon, 9 Bing. 411; Levy v. Drew, 5 D. & L. 387.

^b Pugh v. Kerr, 5 M. & W. 164.

^c Dax, 106.

^d St. Losky v. Green, 30 L.J. C.P. 19; 9 C.B. N.S. 370; Buckland v. Johnson, 23 L.J. C.P. 204.

may always be given as the Court or a judge may think just, to the same extent as if it had been asked for.

The same rule applies to any counterclaim made or relief claimed by the defendant in his defence (Order 20, r. 6).

Costs where facts not properly denied or admitted.

By Order 21, r. 9, where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.^a

Costs of further and better particulars of pleadings and notices.

A further and better statement of the nature of a claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding, requiring particulars, may in all cases be ordered *upon such terms as to costs* and otherwise as may be just (Order 19, r. 7).

Summons for directions.

By Order 30, r. 1, in every cause or matter one general summons for directions may be taken out at any time by any party with respect to the following matters and proceedings:—particulars of claim, defence, or reply, statement of special case, discovery (including interrogatories), commissions and examinations of witnesses, mode of trial (including proceedings in lieu of demurrer, trial on motion for judgment, and reference), place of trial, and any other matter or proceeding in the cause or matter previous to trial.

When returnable. Form.

By rule 2, such summons for directions shall be a summons returnable in not less than four days, in the Form No. 3 in Appendix K, with such variations as circumstances may require, and shall be addressed to and served upon all such parties to the cause or matter as may be affected thereby. The applicant shall, so far as practicable, include in the summons all or as many of the above-mentioned matters and proceedings as, having regard to the nature of the cause or matter, can conveniently be dealt with by the order and directions of the Court or judge.

Application by opposite party for directions.

Upon the hearing of the summons, any party to whom the summons is addressed shall be at liberty to apply for any order or directions as to any of the above-mentioned matters or proceedings which he may desire, and thereupon, after giving notice to such parties (if any) as the Court or judge may direct, any order may be made, and all necessary directions given, as to all or any of such matters and proceedings as may be just, whether applied for or not: such order shall be in the Form No. 4 in Appendix K, with such variations as circumstances may require.

^a As to costs of amending or striking out unnecessary pleadings *see ante* p. 128, and Order 19, r. 27; Order 65, r. 27 (31).

By rule 3, if, upon any other application as to any of the above-mentioned matters or proceedings, it shall appear to the Court or judge that the application is one that could and ought to have been included in or made upon the general summons for directions, *such application shall be granted only at the costs of the party making the same.*

Costs of unnecessary application.

The costs of applications to extend the time for taking any proceedings are in the discretion of the taxing officer, unless the Court or judge shall have specially directed how the costs are to be paid or borne. The taxing officer shall not allow the costs of more than one extension of time unless he is satisfied that such extension was necessary and could not with due diligence have been avoided (Order 65, r. 27 (24)).

Costs of application to extend time.

The costs of a summons to extend time are not to be allowed in cases to which rule 8 of Order 64^a applies, unless the party taking out such summons has previously applied to the opposite party to consent, and he has not given a consent, to a sufficient extension of time, or the taxing officer shall consider there was a good reason for not making such application. In case the taxing officer shall not allow the costs of such summons, and shall consider that the party applying ought to pay the costs of any other party occasioned thereby, he may direct such payment or deal with such costs in the manner provided by Regulation 21 (*ibid.*).

Where any of the parties to a summons fail to attend, whether upon the return of the summons or at any time appointed for the consideration or further consideration of the matter, the judge may proceed *ex parte*, if, considering the nature of the case, he think it expedient so to do; no affidavit of non-attendance shall be required or allowed, but the judge may require such evidence of service as he may think just (Order 54, r. 5).

Non-attendance on summons at chambers.

Where the judge has proceeded *ex parte*, such proceeding shall not in any manner be reconsidered in the judge's chambers, unless the judge shall be satisfied that the party failing to attend was not guilty of wilful delay or negligence; and in such case the costs occasioned by his non-attendance shall be in the discretion of the judge, who may fix the same at the time, and direct them to be paid by the party or his solicitor before he shall be permitted to have such proceeding reconsidered, or make such other order as to such costs as he may think just (Order 54, r. 6).

Costs where no wilful delay or negligence in attending summons.

^a This rule provides that the time for delivering, amending, or filing any pleading, answer, or other document may be enlarged by consent in writing without application to the Court or a judge.

Costs of
non-attend-
ance on
summons.

Where a proceeding in chambers fails by reason of the non-attendance of any party, and the judge does not think it expedient to proceed *ex parte*, the judge may order such a amount of costs (if any) as he shall think reasonable to be paid to the party attending by the absent party or by his solicitor personally (Order 54, r. 7).

Under the old practice it was also held that a judge has power to fix the amount of costs at once of an application at chambers to make an order for an amendment.^a

Party not
interested
appearing
at Cham-
bers.

Where any party appears upon any application or proceeding in Court or at chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance unless the Court or judge shall expressly direct such costs to be allowed (Order 65, r. 27 (23)).^b

Costs of
setting
aside pro-
ceedings
for irregu-
larity.

The costs of setting aside any process or proceeding for irregularity is in the discretion of the Court or judge, under the provisions of Order 65, r. 1. By the old practice, if the summons to set aside proceedings on the ground of irregularity did not ask for costs, the party who took out the summons might not get them. But now when a summons is taken out to set aside any process or proceeding for irregularity "*with costs*," and the summons is dismissed generally without any special direction as to costs, it is to be understood as dismissed with costs (Order 70, r. 4).

It would seem that, if the judge refused to give costs, the successful party would not be entitled to appeal from such refusal, inasmuch as such an appeal would be from an order as to costs, which by law are left to the discretion of the judge within the meaning of section 49 of the Judicature Act, 1873.

No application to set aside any proceeding for irregularity is to be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity (Order 70, r. 2).

^a Collins *v.* Aaron, 6 Dowl. 423 : 4 Bing. N.C. 233 ; as to costs of proceedings at Chambers not certified for, *see* Mann *v.* Harbord, L.R. 5 Ex. 17 : 39 L.J. Ex. 27.

^b *See* remarks of Jessel M.R. in Sharp *v.* Lush, 10 Ch. D. 473, as to the practice in the Chancery Division.

CHAPTER XV.

COSTS OF MISCELLANEOUS MATTERS.

THE expenses of producing and proving all such documents as ^{Proof of} are necessary to support any issue or issues upon which a party ^{documents.} has succeeded will be allowed to him on taxation as between party and party. In order to lessen the costs of such proof, provision is made by the Rules of Court for the admission by either party of any documents.

Thus Order 32, r. 2, provides that either party may call ^{Costs of} upon the other party to admit any document, saving all just ^{proving} exceptions; and in case of refusal or neglect to admit, after such ^{documents} notice, the costs of proving any such document shall be paid by ^{after notice} the party so neglecting or refusing, whatever the result of the ^{to admit.} cause or matter may be, unless at the trial or hearing the Court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.^a

And by rule 7, an affidavit of the solicitor or his clerk of the ^{Evidence} signature of any admissions made in pursuance of any notice to ^{of admis-} admit documents or facts, shall be sufficient evidence of such ^{sion.} admissions, if evidence thereof be required.

The above-mentioned rule 2 is in substance the same as section 117 of the Common Law Procedure Act, 1852. Under that section it has been decided that a party who is called upon to admit the authority by which documents mentioned in the notice were written, might reject the whole, and having done so, and having obtained a verdict in his favour, the other party who proved these documents at the trial had no right to the costs of such proof under the section in question. It seems also that each admission sought is to be treated as a separate part

^a See Appendix B, form 11, for form of notice to admit documents; also see *Day v. Vinson*, 33 L.J. Ex. 171.

of the notice.^a The section also applies to writs of inquiry and inquisitions of any kind.^b

If one party applied under that section to the other to admit documents, all that he had a right to ask was that the due execution of the document should be admitted. If he asked at the time for an admission of the authority by which the documents were written, the party called on to make the admission was not bound to do so. The party tendering the admission was bound to take care that he did not ask too much.^c

Costs of notice to admit or produce unnecessary documents.

By Order 32, r. 9, if a notice to admit or produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.^d

Notice to produce documents.

It may also here be stated that, where notice to produce documents has been given in accordance with the Form No. 2 in Appendix B, which may be varied as circumstances require, an affidavit of the solicitor or his clerk of the service of such notice and of the time when it was served, with a copy of the notice to produce, is, under Order 32, r. 8, in all cases sufficient evidence of the service of the notice and of the time when it was served.

The notice to admit or produce documents should be given a reasonable time before trial; and to entitle the party to the costs of proving the documents, it must include documents whether in the custody or control of the parties or in the hands of third parties who will not part with the custody of them.

To what documents r. 2 applies.

Rule 2 would extend to every document which a party proposes to adduce in evidence, and is not confined to documents in his custody or control.^e It would also seem to include foreign judgment.^f

A party who proposes to adduce in evidence a document at the trial was, it seems, bound in every case, in order to entitle himself to the costs of proving it, to give a notice to admit, so as to afford the other party an opportunity of admitting it, notwithstanding that the document is put in issue on the pleadings.

^a Oxford, &c. *R. Co. v. Scudamore*, 1 H. & N. 666.

^b Reg. Gen. Hil. Term, 1853, r. 30.

^c Oxford, &c. *R. Co. v. Scudamore*, 1 H. & N. 666 *per Pollock C.B.* at p. 688; see also *Wilkes v. Hopkins*, 1 C.B. 737; *Freeman v. Steggall*, 1 Q.B. 202; 19 L.J. Q.B. 18; *Vane v. Whittington*, 2 Dowl. N.S. 757; *Sharpe v. Lamb*, 11 Ad. & E. 805.

^d As to notice to produce documents and costs of copies taken, see Order 31, r. 15.

^e *Rutter v. Chapman*, 8 M. & W. 388 decided on Rule 20 of Hil. Term 4 Will. iv. an analogous rule to the present Rule 2 of Order 32.

^f *Smith v. Bird*, 3 Dowl. 641.

^g *Spencer v. Barough*, 9 M. & W. 425; 11 L.J. Ex. 378.

and this even though the solicitor on the other side upon application had refused to admit the document upon the ground that it was a forgery.

It may be noticed, however, that the provisions of Order 32, r. 2, as to giving notice to admit are in general imperative, but that it need not be given in cases where in the opinion of the master the omission to give the notice is a saving of expense.^a

The costs of proving a document which has been rejected at the trial will not be allowed upon taxation.^b

The master on taxation will allow the expenses of witnesses who produce documents in Court when the original documents are necessary to be given in evidence; also when they are in the possession of a third person who will not permit them to be taken out of his possession.^c

Expenses of witness producing original document allowed.

The expense of stamping documents for the purpose of making them evidence cannot be allowed on taxation between party and party.^d

Expenses of stamping documents.

It is somewhat doubtful whether the expenses of procuring secondary evidence of a document which has been destroyed by the negligence of a party or his agent would be allowed. Thus, in an action on a bill of exchange, where the plaintiff called two witnesses to prove the contents of the bill which had been destroyed by the carelessness of the plaintiff's solicitor's clerk, the master disallowed these expenses on the ground that they were caused by the negligence of the plaintiff's agent. The Court of Exchequer, however, were divided in opinion as to whether such expenses should be allowed, so that the application to review the master's taxation dropped.^e

Expenses of procuring secondary evidence of documents.

It would also seem that the costs of copies of important documents, maps, or plans, which have been prepared for the use of the judge and jury, will be allowed; ^f subject, however, to this that they were necessary, and that it was reasonable for them to be prepared.^g

Costs of copies of documents maps or plans for use of judge or jury when allowed.

A charge for copies of papers delivered for the use of the judge at the trial will also be allowed; for it is provided by Order 36, r. 30, that the party entering the trial shall deliver to

Copies of pleadings for Judge.

^a As to old practice see Reg. Gen. Hil. Term, 1853, r. 30.

^b *Bagnall v. Underwood*, 11 Price 510; *Phillips v. Harris*, 1 Car. & M. 492; *Doe d. Peters v. Peters*, 1 Car. & K. 279; *Freeman v. Rosher*, 6 D. & L. 517; 18 L.J. Q.B. 105.

^c Dax 266.

^d *Ibid.* 267.

^e *Matthews v. Livesey*, 24 L.J. Ex. 252; 11 Ex. 221.

^f Dax 267.

^g See *Holmes v. Holmes*, 2 Bing. 75; 9 Moo. 158, as to allowance for plans used by the Court.

the proper officer two copies of the whole of the pleadings, one of which shall be for the use of the judge at the trial. Such copies shall be in print, except as to such parts (if any) of the documents as are by these rules permitted to be written.^a

Admission
of facts re-
ferred to in
notice.

By Order 32, r. 4, any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice.^b And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the Court or a judge certify that the refusal to admit was reasonable, or unless the Court or a judge shall at any time otherwise order or direct.

Effect of
admission.

Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving the notice.

Provided also, that the Court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

The object of rule 4 is, of course, to save a party being put to the expense of proving facts which the other party may reasonably be expected to admit.

Costs
where facts
improperly
denied or
not
admitted.

So also where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted (Order 21, r. 9).

Costs of in-
spection
and dis-
covery.

Under Order 31 either party to any cause or matter is allowed, in some cases without and in others with, the leave of the Court or judge, to deliver interrogatories in writing for the examination of any one or more of the opposite parties;^c and where an application is made for leave to exhibit such inter-

^a See Order 66 as to cases in which documents, &c., are to be printed, and as to charges to be made.

^b See Appendix B, form 12, as to notice to admit facts, and form 13, which may be varied as circumstances require, as to form of admissions of fact.

^c See Order 31, r. 1.

rogatories, the Court or judge is to take into account any offer which may have been made by the party sought to be interrogated, to deliver particulars, or make admissions, or to produce documents relating to the matters in question or any of them.^a A party, however, who exhibits interrogatories unreasonably, vexatiously, or at improper length, will be made to pay in any event the costs occasioned by so doing.

Thus, by rule 3, in adjusting the costs of the cause or matter, inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court or judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

Costs of improperly exhibiting interrogatories.

Moreover, if a party who has been interrogated omits to answer or answers insufficiently, the party interrogating may apply to the Court or a judge for an order requiring him to answer, or to answer further as the case may be, and an order may be made requiring him to answer, or answer further, either by affidavit or by *vivâ voce* examination.^b A master has jurisdiction to order the party who has insufficiently answered interrogatories to be examined *vivâ voce*, and to pay the costs occasioned by the examination in any event.^c

Costs of insufficiently answered interrogatories.

Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof;^d and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or judge shall deem sufficient for not complying with such notice: in which case the Court or judge may allow the same to be put in evidence *on such terms as to costs and otherwise as the Court or judge shall think fit* (Order 31, r. 15).^e

Notice to produce documents referred to in pleadings, or affidavit.

^a Rule 2.

^b Order 31, r. 11.

^c *Vicary v. G. N. R. Co.*, 9 Q.B. D. 168; 51 L.J. Q.B. 462; as to power of Court or judge to order production of documents on oath *see* Order 31, r. 14.

^d *See* Appendix B, form 9, which may be varied as circumstances require.

^e As to costs of inspection and discovery under 14 & 15 Vic. c. 99, s. 6, and 17 & 18 Vic. c. 125, s. 50 *see* *Republic of Peru v. Weguelin*, L.R. 7 C.P.

But by Order 65, r. 27 (17), as to inspection of documents under Order 31, r. 15, no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection.

Charges for
copies of
documents
in posses-
sion of
another
party.

With regard to the charges for taking copies of or extracts from documents in certain cases, it is provided by regulation 1 of the above-mentioned rule 27 that: "As to taking copies of documents in possession of another party, or extracts therefrom under rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4d. per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof."

Security
for costs of
discovery.

Then by rule 25 of Order 31: "In every cause, or matter, the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the Court or a judge, be secured in the first instance as provided by rule 26 of this Order, by the party seeking such discovery, and shall be allowed as part of his costs where, and only where, such discovery shall appear to the judge at the trial, or, if there is no trial, to the Court or a judge, or shall appear to the taxing officer, to have been reasonably asked for."

Party seek-
ing dis-
covery to
deposit £5.

And by rule 26, any party seeking discovery by interrogatories shall, before delivery of interrogatories, pay into Court to a separate account in the action, to be called "Security for Costs Account," to abide further order, the sum of £5, and, if the number of folios exceeds five, the further sum of 10s. for every additional folio.

Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into Court, to a like account, to abide further order, the sum of £5, and may be ordered further to pay into Court as aforesaid such additional sum as the Court or a judge shall direct. The party seeking discovery shall, with his interrogatories, or order for discovery, serve a copy of the receipt for the said payment into Court, and the time for answering or making discovery shall in all cases commence from the date of such service.

The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said

352: 41 L.J. C.P. 144; Hill v. Philp, 7 Ex. 232: 21 L.J. Ex. 82; Stilwell v. Ruck, 4 H. & N. 468.

payment has been made. In a recent case at Chambers, *Field v.* refused to grant an application by the plaintiffs that security for the costs of certain interrogatories under these rules might be dispensed with although the other side consented, being of opinion that the condition was not imposed solely for the benefit of the party interrogated, but was intended generally to prevent what had been found to be a very oppressive system; and that the safeguard which the rules had created would be very much weakened and would gradually be totally destroyed if a system of consenting to its not coming into operation was once arrived at.^a

Provision is thus made as to the payment into Court of a sum of money, to abide further order, for the purpose of putting a check upon the improper use of the power of interrogating. And rule 27 further provides that unless the Court or a judge shall at or before the trial otherwise order, the amount standing to the credit of the "Security for Costs Account" in any cause or matter, shall after the cause or matter has been finally disposed of be paid out to the party by whom the same was paid in on his request, or to his solicitor on such party's written authority, in the event of the costs of the cause or matter being adjudged to him, but, in the event of the Court or judge ordering him to pay the costs of the cause or matter, the amount in Court shall be subject to a lien for the costs ordered to be paid to any other party.

Disposal of sum deposited.

The costs of taking an office copy of an affidavit of discovery of documents will not be allowed on taxation; for it is provided by Order 65, r. 27 (54) that it shall not be necessary to take an office copy of an affidavit of discovery of documents, and the copy delivered by the party filing it may be used as against such party.

Costs of office copy of affidavit of discovery not allowed.

Formerly the costs of executing a commission to examine witnesses, either in this country or abroad, under the provisions of 1 Will. iv. c. 22, s. 4, were, unless otherwise ordered, costs in the cause.^b

Costs of commission to examine witnesses.

The costs of taking the evidence of a witness under sect. 4 were not allowed to the party taking it as costs in the cause, under sect. 9, unless the depositions had been used at the trial by the party taking it.^c If a witness was so old and infirm that it was a prudent course to take his examination under section 4, but he was afterwards able to attend the trial, the plaintiff might

^a *Hall v. Liardet*, L.J. November 17, 1883, p. 624 : W.N. 1883 p. 176.

^b Sec. 9 is repealed by 42 & 43 Vic. c. 59 schedule; but sec. 4 seems still to be in force; *Prince v. Samo*, 4 Dowl. 5.

^c *Ridley v. Sutton*, 1 H. & C. 741 : 32 L.J. Ex. 122; *Curling v. Robertson*, 13 L.J. C.P. 169 : 7 M. & G. 525.

be allowed the costs of the commission as well as the costs of the witness's attendance at the trial.^a The costs of the examination under this statute of a witness who was about to go abroad were disallowed as costs of the cause, where the depositions were rendered useless by the subsequent attendance of the witness at the trial.^b

So also the costs of examining a witness before a master or other person named in the order under 1 Will. iv. c. 22 were costs in the cause, unless otherwise ordered, either by the judge making the order, the judge who tried the cause, or by the Court.^c

Where a commission was taken out by a defendant to examine a witness abroad, but at the trial the plaintiff's counsel abandoned that part of the case to which the evidence under the commission applied, and the defendant had a verdict on that issue, it was held that he was entitled to the costs of the commission.^d

The master is to decide what costs are to be allowed,^e and as a general rule the discretion exercised by him will not be interfered with.^f

Upon taxation of the costs of the cause the master, where the successful party was entitled to the costs of the examination, if it were taken abroad, allowed the reasonable expenses of the commission; modifying the charges of the commissioners and payments to witnesses, if he think them unreasonable or extravagant. If the examination was under a judge's order or rule of Court he allowed for the application and the costs of the proceedings under it, such as the drawing and settling of interrogatories (if any), fees and briefs to counsel, where counsel attend the examination, the attendance of the solicitor, payments to witnesses, &c.^g

Examina-
tion of wit-
ness by
order of the
Court.

A general power is now given by Order 37, r. 5, to the Court or a judge in any cause or matter, where it shall appear necessary for the purposes of justice to order the examination, according to the regulations made for that purpose in the rules of Court, of a witness upon oath before the Court or a judge or any officer of the Court or any other person and *at any place*; and the Court or judge may empower any party to the cause or

^a Duke of Beaufort *v.* Earl of Ashburnham, 32 L.J. C.P. 97 : 13 C.B. N.S. 598.

^b Ridley *v.* Sutton *supra*.

^c Sec. 9.

^d Jewell *v.* Parr, 17 C.B. 636 ; 25 L.J. C.P. 179 ; and *see* Same *v.* Same, 2 C.B. N.S. 809.

^e M'Alpine *v.* Poles, 1 C. & M. 795 : 2 Dowl. 299.

^f Cornet *v.* Dempsey, 1 Dowl. N.S. 422.

^g Marshall 280.

matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct.* This rule will, it is suggested, in effect do away with commissions under 1 and 2 Will. iv. c. 22, which has just been referred to, as power is given to order the examination before any person and at any place, and would meet the case of applications for a commission either in this country or abroad.

Under rule 7, any person may be ordered to attend for the purpose of producing any writings or other documents named in the order which the Court or a judge may think fit to be produced, but no person will be compelled to produce any writing or other document which he could not be compelled to produce at the trial or hearing; and by rule 8, any person who wilfully disobeys an order to attend and be examined or produce documents, is to be deemed guilty of contempt of Court.

Under rule 9, any person required to attend for the purpose of being examined or of producing any document shall be entitled to the like conduct money, and payment for expenses, and loss of time as upon attendance at a trial in Court. The master will therefore allow to the party entitled to these costs the expenses of the witnesses attending before the examiner, upon the same principle as if they had attended at a trial in Court.

By rule 13, if any person duly summoned by *subpœna* to attend for examination shall refuse to attend, or if, having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed at the Central Office, and thereupon the party requiring the attendance of the witness may apply to the Court or a judge *ex parte* or on notice for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.

By rule 14, if any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Central Office to be there filed, and the validity of the objection shall be decided by the Court or a judge.

And by rule 15, in any case under the two last preceding rules, the Court or a judge shall have power to order the witness to pay any costs occasioned by his refusal or objection.

* See Appendix K, form 36 as to form of order for a commission; and Appendix J, form 13, as to writ of commission, which may be varied as circumstances require; Order 37, r. 6; see also Com. Law Proc. Act, 1854, ss. 46, 53, 57.

CHAPTER XVI.

COSTS OF MOTIONS.

Motion for new trial : where trial with jury to Divisional Court. EVERY motion for a new trial or to set aside a verdict, finding, or judgment in every cause or matter (except where such is assigned to the Probate, Divorce, and Admiralty division) where there has been a trial thereof or of any issue therein with a jury is to be made to a Divisional Court of the Queen's Bench Division (Order 39, r. 1).

Where trial without jury to Court of Appeal. But where there has been a trial without a jury such motion must be by way of appeal direct to the Court of Appeal.

By notice. Rule *nisi* abolished. Every application for a new trial is to be by notice of motion, and no rule *nisi*, order to show cause, or formal proceeding other than such notice of motion is to be made or taken. The notice is to state the grounds of the application, and whether all or part only of the verdict or findings is complained of (r. 3).

Amendment of notice. The notice may be amended at any time by leave of the Court or judge upon such terms as the Court or judge may think just (r. 5).^a

Costs. Hitherto the Court as a general rule either made absolute or discharged the rule *nisi* for a new trial *with costs*.

Where new trial ordered. The effect of that order was that the party who succeeded on the second trial was entitled to the costs of the first trial, independently of the result of the first trial, as well as to the costs of the rule for the new trial, as part of the costs which follow the event.^b There does not appear to be any provision in the R. S. C., 1883, to alter this rule. The practice on this subject was formerly different ; for if the rule for a new trial contained the term "costs to abide the event," the event upon which the costs depended was the event of the fresh trial, as to the particular trial of which the Court had granted the rule. If the

Former practice.

^a The other rules of this Order deal with the length of notice to be given, and the grounds upon which a new trial will be granted or refused. It is not necessary to refer further to them, as they do not touch the question of costs.

^b *Field v. G. N. R.*, 3 Ex. D. 261 : 47 L.J. Ex. 662 ; *Green v. Wright*, 2 C.P. D. 354 : 46 L.J. C.P. 427.

party who had obtained a verdict at the first trial was successful at the second, he got his costs ; but if the event was not the same the costs of the first trial were thrown away.^a

It seems that where the Court were equally divided in opinion, neither party, unless the Court otherwise ordered, were entitled to the costs of the application for a new trial.^b

If the plaintiff consented to the verdict being reduced, it was usual for the rule nisi to be discharged, each party paying his own costs of the rule, but sometimes the defendant was ordered to pay them.^c

Where, under the old practice, a rule *nisi* was granted, the party who had obtained it had to bespeak of the principal clerk of the judge who tried the cause the judge's notes, to be used on the argument of the rule, and pay the treasury fee of 5s. thereon. If the judge who tried the cause was not a judge of the Queen's Bench Division, a further fee of 6d. per folio had to be paid. If, when the case came on for argument, the notes had not been bespoken, or not paid for, the Court either discharged the rule with costs or adjourned the case, making the party in default pay the costs occasioned thereby.^d

Party to bespeak judge's notes taken at trial.

With regard to motions generally, these are in practice either allowed or refused with costs. Where a motion is refused with costs or any costs are by any general or special order directed to be paid, the taxing officer may tax such costs without any order referring the same for taxation, unless the Court or a judge upon the application of the party alleging himself to be aggrieved prohibits the taxation of such costs (Order 65, r. 27 (33)).

Motions generally.

If on the hearing of a motion or other application the Court or a judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof in order that such notice may be given *upon such terms*, if any, as the Court or judge may think fit to impose (Order 52, r. 6).

Person not party to an action may be served with notice of motion.

Where notice had been given of a motion before the Court to rescind a judge's order, and the parties who gave the notice did not appear, the Court ordered them to pay the costs of the other party who appeared to oppose the motion.^e

Party not appearing in support of motion.

Where the plaintiff served an invalid notice of motion on the

Party appearing to oppose invalid

^a Jones *v.* Williams, L.R. 8 Q.B. 280 : 42 L.J. Q.B. 48.

^b Dansey *v.* Richardson, 23 L.J. Q.B. 361 : 2 E. & B. 722.

^c Vizard's Pr. of the Court in Banc. 43.

^d *Ibid.* 42.

^e Berry *v.* Exchange Trading Co. 1 Q.B. D. 77 : 45 L.J. Q.B. 224.

notice of
motion, not
entitled to
costs.

defendants, but failed to appear and support the motion, it has been held that the defendants who appeared in Court to oppose the motion were not entitled to their costs of so doing, for they were not bound to appear at all to an invalid notice.^a

Costs
where
Court
has no
jurisdic-
tion.

In a case in the Exchequer Division it was held that where the Court has no jurisdiction to hear a case it has no jurisdiction over the costs of the application; and that the party who appears must be taken to have done so simply as *amicus curiæ* to point out that the Court has no jurisdiction.^b But in a later case the Queen's Bench Division did not follow that decision, being of opinion that a party was obliged to appear and point out the absence of jurisdiction, otherwise judgment would be given against him if he did not do so. That being so, the Court had jurisdiction to some extent over the subject matter, viz., to hear and determine whether an appeal to the Court would lie or not, and therefore had jurisdiction to give costs.^c

Costs
where or-
der of judge
at cham-
bers re-
versed.

Costs follow the reversal of a decision of the judge at chambers.^d

^a Daubney *v.* Shuttleworth, 1 Ex. D. 53 : 45 L.J. Ex. 177.

^b Brown *v.* Shaw, 1 Ex. D. 425.

^c Great Northern Committee *v.* Inett, 2 Q.B. D. 284 : 46 L.J. M.C. 237.

^d Friend *v.* The London, Chatham & Dover R. Co. 25 W.R. 735.

CHAPTER XVII.

COSTS OF THE DAY.

UNDER the old practice, where a plaintiff gave notice of trial and neglected to proceed to trial pursuant to such notice, or where he did not countermand such notice in due time, or where after entering the cause for trial he withdrew the record, he was liable to the opposite party for all such costs as had been occasioned thereby ; and those costs were usually called the "costs of the day." Provision, however, is now made by the Rules of Court in respect of these matters, and the practice is to a great extent, if not wholly altered. Thus, under Order 36, r. 19, "No notice of trial shall be countermanded except *by consent or by leave* of the Court or a judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just."

Counter-
mand of
notice of
trial.

So also, under rule 34 of the same Order, "The judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit."

Adjourn-
ment of
trial upon
terms.

Of course under this rule the judge as one of the terms imposed, may order the party who applies for the postponement or adjournment to pay the costs of the day.*

Then again, by rule 31, "If, when a trial is called on, the plaintiff appears, and the defendant does not appear, the plaintiff may prove his claim, so far as the burden of proof lies upon him." And by rule 32, "If, when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counterclaim, shall be entitled to judgment dismissing the action, but if he has a counterclaim, then he may prove such counterclaim so far as the burden of proof lies upon him."

Non ap-
pearance of
defendant,

or of plain-
tiff at trial.

* As to what constitutes reasonable excuse for not proceeding to trial see Archb. Pr. (ed. 13), vol. ii. p. 1205 ; see also *Pell v. Linnell*, L.R. 3 C.P. 441 : 37 L.J. C.P. 191 ; *Hooper v. Barnett*, 22 W.R. 575 ; *Sully v. Noble*, 1 H. & C. 809 : 32 L.J. Ex. 145.

Setting
aside judg-
ment in de-
fault of
appearance
at trial.

A plaintiff or defendant who proceeds under these rules would obtain judgment with costs, unless the judge otherwise orders, or if he is a plaintiff, is not deprived of his costs under section 5 of the County Courts Act, 1867 (30 & 31 Vic. c. 142). These costs would necessarily include the costs of the day, which are part of the costs in the cause. A verdict or judgment so obtained may be set aside upon terms. Thus it is further provided by rule 33: "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex."

Costs
where
cause
struck out.

Also by Order 65, r. 27, regulation 50, "Where a cause or matter which stands for trial is called on to be tried, but cannot be decided by reason of a want of parties or other defect on part of the plaintiff, and is therefore struck out of the paper, and the same cause is again set down, the defendant shall be allowed the taxed costs occasioned by the first setting down, although he does not obtain the costs of the cause or matter."

The effect of these rules would seem to be to practically get rid of the questions which formerly arose under similar circumstances, and which were the subject of decision—whether the party who was not in default, after giving notice of trial or entering the cause for trial, was entitled to the costs of the day.

Where
cause made
a remanet
plaintiff
formerly
not subject
to costs of
the day.

Formerly where the cause was made a remanet either by consent of the parties, or by reason of pressure of business at the assizes, or if it was postponed by order of the judge, or by an order of *nisi prius*, neither party was liable for the costs of the day, but they were usually made costs in the cause.^a But where the cause was postponed at the instance of one of the parties, it was usually made a condition that that party should pay the costs of the day.^b Where both parties were in default in proceeding to trial, neither was entitled to the costs of the day.^c So also where one of the parties failed to attend the trial which was postponed by the default of the other party in not procuring the attendance of a special jury, the party who did not attend was not entitled to the costs of the day.^d

Costs of the
day on writ
of inquiry.

The provisions of Order 36, rr. 19, 34, *inter alia*, apply with the necessary modifications to an inquiry pursuant to a writ of

^a Dax, 101; Blow *v.* Wyatt, 4 M. & W. 407; Waters *v.* Weatherby, 3 Dowl. 328.

^b Marshall, 119; *see* Sparrow *v.* Turner, 2 Wils. 366.

^c Marshall, 120; Morgan *v.* Fernyhough, 11 Ex. 205; 25 L.J. Ex. 52.

^d Newton *v.* Chaplin, 7 C.B. 774.

inquiry.* Formerly if the plaintiff did not proceed to execute the writ of inquiry, the defendant was entitled to the costs of the day ; but he had to make an affidavit of attendance and of expenses incurred.^b

It is somewhat doubtful whether or not a plaintiff suing in formâ pauperis is liable under the present practice to pay the costs of the day, where he omits to proceed to trial pursuant to notice. Under the old practice,^c he could be ordered to pay these costs. The rule under which the power to make the order was given is annulled *en bloc* with all the rules of Hil. Term, 1853,^d and then Order 72, r. 2 further provides that where no other provision is made by the Acts or the rules the present procedure and practice remain in force. The rules do not make any express provision for the payment of costs of the day by the pauper, nor did the rules of the Supreme Court, 1875, which have been annulled, and which contained a provision similar to the above-mentioned Order 72, r. 2.^e It may, therefore, be that rule 122 of Hil. Term, 1853, is still preserved, although *primâ facie* annulled.

The costs of the day when paid by the plaintiff include all such costs as the defendant may have necessarily incurred by reason of the notice of trial having been given. Such costs include the resealing of the subpoenas, the subpoenaing of witnesses and payments to them when properly made ; also refresher fees to counsel, when the trial of the cause is postponed to another term.^f In cases of importance and difficulty and where there was a necessity for a second consultation, the consultation fees to counsel and the usual attendances on them will probably be now allowed, if the taxing master in the exercise of his discretion think that it is necessary and reasonable that they should be allowed.

Where the defendant has to pay the costs of the day the same rule applies as to the payment of all costs that have been occasioned by the delay, including similar costs as are allowed to the defendant as above-mentioned for the subpoenas, witnesses, &c., and they would include also the costs of altering and re-entering the action for trial.^g

Subject to the discretion of the master, and unless otherwise

* Order 36, r. 56.

^b See Reg. Gen. Hil. Term, 1853, r. 39.

^c See Reg. Gen. Hil. Term, 1853, r. 122.

^d Appendix O (16).

^e See Note which preceded Order 1 of the Rules of the Supreme Court, 1875.

^f Dax, 101.

^g Dax, 102.

mean costs
of last day
only.

At the
Assizes in-
clude the
costs of the
whole
Assizes.

Defendant
not entitled
to costs of
day unless
jury sworn.

Award of
lump sum
in lieu of
taxed costs.

ordered, where the plaintiff or defendant is ordered to pay the costs of the day in town causes, it would only mean the costs of the last day when the action is postponed or made a remanet. But at the assizes the costs of the day are not confined to the costs of the day when an action is postponed or withdrawn by consent, but extend to the whole assizes.^a

Under the old practice a defendant was not entitled to the costs of a jury as part of the costs of the day, where the plaintiff was nonsuited if the jury had not been sworn.^b

Where a plaintiff obtains an order under Order 36, r. 19, countermanding notice of trial "upon payment of costs," their payment would, as in other cases where a like order is made, be a condition precedent to the notice being actually countermanded and the trial postponed.^c

Where the order is simply to the effect that the notice of trial be countermanded or the trial postponed and that the plaintiff in the first case, or either of the parties in the second, do pay the costs of the day, the order as to their payment is absolute, and can be enforced in the usual manner in which orders of the Court are enforceable.

The Court or a judge, moreover, can order a lump sum to be paid in lieu of taxed costs, under Order 65, r. 23, which provides that "Upon interlocutory applications where the Court or a judge shall think fit to award costs to any party, the Court or judge may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross shall be paid."^d

^a Dax, 102.

^b *Warne v. Hill*, 29 L.J. C.P. 201 ; *Smith v. Marshall*, 33 L.J. Q.B. 332 ; *Sleeman v. Copper Miners of England*, 17 L.J. Q.B. 113 : 5 D. & L. 151 ; *Pope v. Fleming*, 5 Ex. 249 : 19 L.J. Ex. 268.

^c As to making a rule for a new trial absolute upon similar terms see *Marshall*, 159. As to when the words "on payment of costs," amount to a condition, or are words of agreement, see *Horton v. Westminster &c. Co.*, 7 Ex. 911 : 21 L.J. Ex. 325 ; also *Pugh v. Kerr*, 5 M. & W. 164, 167.

^d See also *Collins v. Aaron*, 4 Bing. N.C. 233 : 6 Dowl. 423 ; *Tomlinson v. Bollard*, 4 Q.B. 642 : 12 L.J. Q.B. 257.

CHAPTER XVIII.

COSTS OF AND IN THE CAUSE.

By the "general costs of the cause" is meant all such costs as are necessary for the enforcing of the plaintiff's claim or establishing the defendant's answer to the action, according as the one or the other is successful, and independent of such costs as were altogether improperly incurred by the successful party, by reason, where he is plaintiff, of claiming more than he could establish, or where he is defendant, of raising an unfounded defence^a or perhaps counterclaim.

The party who succeeds in the action and for whom judgment is ultimately entered, or in other words he who wins "the event," is in general entitled to the costs of the cause. If the unsuccessful party wins certain issues he gets the costs of them as costs in but not of the cause.

The rules of Court make provision that the costs of certain proceedings are to be costs in the cause.

Thus, if a cause be removed from an inferior Court having jurisdiction in the cause, the costs in the Court below are costs in the cause (Order 65, r. 3). So also where the plaintiff is directed to pay to the defendant the costs of the cause, the costs occasioned to a defendant by any amendment of the plaintiff's pleadings are to be deemed part of the defendant's costs in the cause (except as to any amendment which appears to have been rendered necessary by the default of the defendant); but there is to be deducted from such costs any sum which may have been paid by the plaintiff, according to the course of the Court at the time of any amendment (Order 65, r. 27 (31)).

The costs of and incidental to an order of arrest under sec. 6 of the Debtors' Act, 1869^b are, unless otherwise ordered, costs in the cause (Order 69, r. 5).

The costs of all interlocutory proceedings, not otherwise specially provided for by the Court, are costs in the cause.^c

^a See Marshall, 198, and Chapter 21.

^b 32 & 33 Vic. c. 62.

^c Pugh v. Kerr, 6 M. & W. 17, *per Alderson B.* : 9 L.J. Ex. 255 : 8 Dowl. 218.

The costs of shewing cause against a rule for setting aside an award were formerly costs in the cause;^a so also the costs of an unsuccessful application for a new trial,^b unless the Court otherwise ordered.

Excep-
tions.

But if a party who has obtained an order "on payment of costs" afterwards abandons the order, the costs of the proceedings are not costs in the cause. So also the costs incurred by a solicitor who, on his own behalf and in the absence of his client, shewed cause against a rule are not costs in the cause.^c

Costs of
proceed-
ings after
final judg-
ment
signed.

But the costs of proceedings taken after final judgment has been signed are not costs of the cause. These costs depend entirely upon the order; and if the order is silent concerning them each party must pay his own costs.^d

Costs of
rule dis-
charged or
made abso-
lute with-
out costs.

Where a rule or order is discharged or made absolute "without costs," the costs of the rule or order cannot afterwards be deemed costs in the cause; or if discharged or made absolute "with costs," although the costs in that case are costs in the cause, yet as the law gives a separate remedy for them by execution, that remedy in practice is generally resorted to, instead of waiting the event of the cause, and then including those costs in the judgment. But if a rule or order be made absolute or dismissed on the terms that the costs of it or the application are to be "costs in the cause," the costs will be taxed for the successful party.^e

It may also here be mentioned that when a summons which is taken out to set aside proceedings for irregularity is dismissed generally without any special direction as to costs, it is to be understood as dismissed "with costs" (Order 70, r. 4).

Costs of
collateral
proceed-
ings.

The costs of proceedings and applications which are proceedings merely collateral to the action are not costs in the cause.^f

The costs of an attempt to refer an action to arbitration which has failed are not costs in the cause.^g Such an attempt is merely collateral to the action and does not in any way advance it.

Costs of
witness re-

The costs of a witness whose evidence has been rejected at

^a Goodall *v.* Ray, 4 Dowl. 1.

^b Eyre *v.* Thorpe, 6 Dowl. 768; Delisser *v.* Towne, 1 Q.B. 333.

^c Southee *v.* Terry, 2 Dowl. 522; Dax, 105.

^d Dax, 104; Newton *v.* Boodle, 4 C.B. 359.

^e Archb. Pr. 451 (ed. 13).

^f Dax, 105; Mummery *v.* Campbell, 2 Dowl. 798.

^g Gribble *v.* Buchanan, 26 L.J. C.P. 24; 18 C.B. 691; Doe *d.* Davies *v.* Morgan, 4 M. & W. 171.

the trial or hearing are not costs in the cause, and will not be allowed as between party and party.^a

It would seem that the costs of an application for an order for directions, pursuant to Order 30, are costs in the cause.^b

Where an action has been made a remanet at the assizes through pressure of business, the costs of so doing are costs in the cause.^c These would include the costs of bringing witnesses to the assize town, attendances, and the like.

Formerly, where the order for a commission to examine witnesses abroad was silent as to the costs of the commission, they were allowed as costs in the cause.^d

Formerly the costs of interrogatories and proceedings thereon were not costs in the cause, if the order were silent as to costs.^e But now the costs of discovery, whether by interrogatories or otherwise, are to be allowed as part of the costs of the party seeking such discovery where and only where such discovery shall appear to the judge at the trial, or if there is no trial to the Court or a judge, or shall appear to the taxing officer to have been reasonably asked for (Order 31, r. 25).

All necessary notices or copies thereof given during the progress of an action are on taxation allowed to the successful party as costs in the cause.^f

A party who is entitled to the costs of the cause is also entitled to the costs properly applicable to those issues upon which he has wholly or in part only been successful, but the unsuccessful party is only entitled to the costs of those issues upon which he has wholly succeeded.^g

The necessary costs of producing a witness on a writ of habeas corpus ad testificandum are costs in the cause; but if the witness attend in more than one cause he will be entitled to a proportionate part of the costs in each cause only.^h

The reasonable costs of notices of action when required to be given by statute are also costs in the cause.ⁱ

Where a matter has been referred to arbitration, and an award and not merely a certificate, is to be made, the costs of the cause

^a *Speeding v. Young*, 16 C.B. N.S. 824 : 33 L.J. C.P. 286.

^b See R.S.C. 1883, Appendix K, form 4.

^c *Bentley v. Carver*, 15 L.J. C.P. 173 : 2 C.B. 817 ; *Gibbons v. Phillips*, 8 B. & C. 437 ; *Waller v. Blacklock*, 15 L.J. Ex. 333 : 15 M. & W. 715.

^d *Prince v. Samo*, 4 Dowl. 5.

^e *Smith v. G. W. R. Co.*, 6 E. & B. 405 : 25 L.J. Q.B. 279.]

^f *Dax*, 139.

^g *Marshall*, 131, 199.

^h *Griffin v. Hoskyns*, 1 H. & N. 95.

ⁱ *Kent v. G. W. R. Co.*, 3 C.B. 714 : 16 L.J. C.P. 72 ; *Edwards v. G. W. R. Co.*, 12 C.B. 419.

comprise the costs incurred in the cause up to the time of the submission, the costs of the order of reference and of making it a rule of Court, and the costs of ulterior proceedings in the cause, if any, after the award.*

It has been and is the practice in many cases to make the costs of applications costs in the cause, or to abide the event, or to be the party's in any event. This is done for the purpose of avoiding a separate taxation, as it often happens that the costs of the taxation itself exceed all the other costs of such proceedings. Rule 23 of Order 65, by which a lump sum instead of taxed costs may be fixed at the time of the application, seems intended to carry out this view.

Costs of
cause.

It is proposed to give, by way of illustration, some of the chief items in a bill of costs, which are allowed upon taxation as costs of the cause, first where the plaintiff, and secondly where the defendant, is successful.

Thus a successful plaintiff's costs of the cause, independent of the result of particular issues, include :—letter before action ; instructions to sue ; writ ; service of writ ; search for appearance if no notice of appearance having been entered is given ; claim or notice in lieu of claim ; instructions for claim ; reply ; attendance to deliver claim, and subsequent pleadings, if delivered ; instructions for same ; all necessary and proper perusals ; notice of trial ; setting down cause ; attendance at the trial ; instructions for brief ; drawing brief and copy for counsel ; copies of necessary documents ; counsels' fees, &c., &c.

A successful defendant's costs of the cause include :—instructions to defend ; undertaking to appear ; entering appearance ; notice of appearance ; perusing statement of claim ; instructions for defence ; drawing same ; delivery of pleadings ; instructions for rejoinder and drawing, if any ; rejoinder ; attendance at trial ; brief for counsel, &c., as in the case of plaintiff.

* Russell on Arbitration, 378 (ed. 6).

CHAPTER XIX.

COSTS OF VIEW AND SPECIAL JURY.

By Order 50, r. 3, it shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the . . . inspection^a of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

Order for inspection of property.

The provisions of rule 3 of this Order shall apply to inspection by a jury, and in such case the Court or a judge may make all such orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury at such time and place, and in such manner as they or he may think fit (r. 5). A party may now *ex parte*, where the other side consent, obtain a view under rule 5.^b

Inspection by jury.

An application for an order under rule 3 may be made to the Court or a judge by any party. The application, if made by the plaintiff, is to be made after notice to the defendant at any time after the issue of the writ of summons. If it be made by any other party, notice must be given to the plaintiff, and at any time after appearance by the party making the application (r. 6).

Application by plaintiff.

By any other party.

The inspection under these rules may, if so ordered, be made either by a special or by a common jury.

Apart from these rules a party can obtain a rule for a view either by a special or by a common jury which is drawn up by the officer of the Court, as a matter of course, upon affidavit, which must state the place at which the view is to be made, and

Rule for a view.

^a Mitchell *v.* The Darley Main Colliery Co., 10 Q.B. D. 457 : 52 L.J. Q.B. 394 : C.L.P. Act, 1854, s. 58.

^b Pickard *v.* G. N. R. Co. The *Law Journal*, Nov. 24, 1883, p. 633.

the distance thereof from the office of the under-sheriff of the county in which the place is situated.^a

Six out of the twelve jurymen generally attend the view.

Appoint-
ment of
showers.

The order for a view contains the names of two showers—one for each party. A notice is generally given to the opposite party that an application is about to be made for an order for a view. If the opposite party neglects to attend the appointment, or refuses to name a shower, the master or district registrar will name one for him. The order is left with the under-sheriff together with a list of the jury if special and if they have been struck, and at the same time a deposit has to be made, the amount of which depends upon whether the jury is a common or a special jury, and upon the distance the place where the view is to be made is from the office of the under-sheriff.^b

Amount of
deposit to
be made
with under-
sheriff.

If such distance does not exceed five miles the sum of £10 in the case of a common jury and £16 in the case of a special jury must be deposited in the hands of the under-sheriff. If such distance is above five miles, £15 in case of a common jury, and £20 in case of a special jury must be deposited. If the sum deposited is more than sufficient to pay the expenses of the view, the surplus is forthwith to be returned to the solicitor of the party who obtained the view; but if it is not sufficient to pay the expenses, the deficiency is forthwith to be paid to the under-sheriff by the solicitor of the party who obtained the view.^c

The under-sheriff has to pay and account for the money so deposited according to the following scale:—

	£	s.	d.
For travelling expenses to the under-sheriff, showers, and jurymen, expenses actually paid, <i>if reasonable</i> .			
Fee to the under-sheriff, when the distance does not exceed five miles from his office	1	1	0
Where such distance exceeds five miles	2	2	0
And in case he shall be necessarily absent more than one day, then for each day after the first a further fee of	1	1	0
Fee to each of the showers the same as the under-sheriff, calculating the distance from their respective places of abode.			
Fee to each common jurymen, per diem	0	5	0
For each special jurymen, per diem	1	1	0
Allowance for refreshment to the under-sheriff, showers, and jurymen, whether common or special, each per diem	0	5	0

^a Reg. Gen. H. T. 1853, rr. 48, 49.

^b Archibald's Country Solicitor's Pr. 310; Reg. Gen. H. T. 1853, r. 47.

^c Reg. Gen. H. T. 1853, r. 49.

	£	s.	d.
To the bailiff for summoning each juryman whose residence is not more than five miles distant from the office of the under-sheriff	0	2	6
And to each whose residence does exceed five miles of such distance	0	5	0

By Order 36, r. 7 (d) : "A judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just." Costs of special jury.

The party who applies for a special jury has to pay the fees for striking the jury, and all the expenses occasioned by the trial of the cause by a special jury, and he is not to have any further or other allowance for the same upon taxation of costs than he would have been entitled to in case the action had been tried by a common jury, unless the judge before whom the action is tried "shall immediately after the verdict certify under his hand upon the back of the record that the same was a cause proper to be tried by a special jury."^a Certificate for special jury.

The usual practice is for the counsel to apply at the close of the trial for the judge to certify for the special jury. But it is sufficient if the certificate is given within a reasonable time after verdict, and then the unsuccessful party has to repay the money to the successful party, if he has paid any.^b The costs of a special jury if the judge certifies depend upon the manner in which the general costs of the cause are ultimately disposed of.^c

If the party who obtains a special jury fails at the trial, the opposite party is entitled, as costs in the cause, to all the expenses to which he has been put by reason of the action having been tried by a special jury, and this without any certificate of the judge.

The judge may, in the exercise of his discretion, either grant or refuse the certificate. In one case it was refused where a question of law was the only question in dispute. There must be some fact in dispute.^d

By rule 44 of Reg. Gen. H. T. 1853, no rule for a special jury is to be granted on behalf of any defendant (or plaintiff in replevin), except on affidavit, either stating that no notice of

^a 6 Geo. iv. c. 50, s. 34.

^b See Archibald's Country Solicitor's Pr. 307 ; *Grace v. Clinch*, 4 Q.B. 606 : 12 L.J. Q.B. 273 ; *Leach v. Lamb*, 11 Ex. 437 : 25 L.J. Ex. 17 ; *Serrell v. Derbyshire R. Co.*, 10 C.B. 910 ; *Christie v. Richardson*, 10 M. & W. 688 : 12 L.J. Ex. 86 ; *Waggett v. Shaw*, 3 Camp. 315.

^c *Waters or Walters v. Howells*, 8 Ex. 244 : 22 L.J. Ex. 96 ; *Boyes v. Bluck*, 13 C.B. 652, 669 : *Dax*, 126 ; *Morrison v. Harmer*, 5 Scott 410.

^d *Wemyss v. Greenwood*, 2 C. & P. 483 : and see *Dax*, 127 ; *Roberts v. Brown*, 6 C. & P. 757 ; *Orme v. Crockford*, 1 C. & P. 537.

trial has been given, or if it has been given then stating the day for which such notice has been given, and in the latter case no such rule is to be granted unless the application is made for it more than six days before that day ; provided that a judge may on summons order a rule for a special jury to be drawn up at any time.

It was formerly held that this proviso was limited to the six days' notice, and that therefore there was no power given to grant the application for a special jury before issue joined, even where, by reason of the defendant being under terms to take short notice of trial, he would not, if he waited till rejoinder, be in time to apply for a special jury a sufficient number of days before the trial.^a But a judge can now make an order for a special jury at any time.

The Court, in the absence of special grounds for so doing, will not interfere with the discretion of a judge who has refused to grant an application by a defendant for a special jury.^b

Costs of
special jury
not "costs
of the
day."

It has, moreover, been held that where a rule has been made for either party to pay the costs of the day, the extra costs occasioned by the rule for a special jury, such as the sheriff's charges for summoning the jury, &c., will not be allowed on taxation. These costs would afterwards be allowed on taxation of the costs of the cause, if the judge certified.^c

Fees pay-
able to
special
jurors.

No juror who serves upon any special jury is to be allowed or to take for serving on any such jury more than such sum of money as the judge who tries the issue shall think just and reasonable, and which shall not exceed the sum of one pound and one shilling, except in causes wherein a view is directed, and shall have been had by such juror.^d

The fee payable to a special juror was fixed at one guinea for each day by section 22 of "The Juries Act, 1870" (33 & 34 Vic. c. 77) ; but that section has been repealed by section 1 of 34 Vic. c. 2. So that the provisions of 6 Geo. iv. c. 50, s. 35, now apply to these fees.

"Good
jury."

By rule 46 of Reg. Gen. H. T. 1853, there shall be no rule for the sheriff to return a good jury upon a writ of inquiry ; but an order shall be made by a judge upon summons for that purpose.

Where, under a judge's order for a "good jury" upon a writ of inquiry, in London or Middlesex, the sheriff selected the

^a *Dresser v. Norman*, 6 C.B. N.S. 427.

^b *Smith v. London and St. Katherine's Dock Co.*, L.R. 2 C.P. 630.

^c *Dax*, 127 ; *Morgan v. Miller*, 9 Dowl. 51.

^d 6 Geo. iv. c. 50, s. 35.

jurors from the special jury list, it was held that each juror was entitled to be paid one guinea.^a

Where a sufficient number of special jurymen fail to attend, ^{Talesmen} the number is generally made up by talesmen, who, although not strictly entitled to be paid a guinea, the sum usually allowed to special jurymen, are generally paid that sum, and the master on taxation as between party and party allows that sum if it has been paid.^b

^a *Vines v. London, Brighton & S. C. R.*, L.R. 5 Ex. 201 : 39 L.J. Ex. 175 ; *Frost v. Same*, 39 L.J. Ex. 54 ; *Vickery v. Same*, L.R. 5 C.P. 165 : 39 L.J. C.P. 169 ; Reg. Gen. H. T. 1853, r. 46.

^b *Morris v. Hunt*, 1 Chitt. 544 ; *see also* 6 Geo. iv. c. 50, s. 37.

CHAPTER XX.

COSTS IN THE COURT OF APPEAL.

Jurisdiction over costs.

THE Court of Appeal has power to make such order as to the whole or any part of the costs of the appeal as may be just (Order 58, r. 4).

General rule.

The general rule as to costs in the Court of Appeal is that the successful party gets them.^a The costs in the Court below are governed by the result of the appeal, and an order in the Court below for the payment of costs falls when the judgment is reversed in the Court of Appeal. This is so upon the principle that the costs are accessory to the judgment, and that the whole judgment includes that part of it which relates to costs.^b

It seems that the Court of Appeal has no power to alter an order, when once given, as to the costs of interlocutory proceedings.^c

Under an order of the Court of Appeal, which directs costs to be paid, a party, in the absence of any direction to the contrary may tax and be paid those costs forthwith, *i.e.*, before the termination of the action.^d

Costs where Court divided in opinion.

In practice, where the members of the Court of Appeal are equally divided in opinion the appeal is dismissed and the Court sometimes makes a special order as to the respondent's costs. Formerly he was not entitled to any costs.^e

Costs of appeal and cross appeal.

The following rules of Order 58 authorize the Court of Appeal to deal with the costs under certain circumstances—thus, by rule 6, it is not under any circumstances necessary for a re-

^a See also Mem., 1 Ch. D. 41. The old rule was that where the judgment of the Court below was affirmed the respondent got his costs; but the appellant did not get them on a reversal of the judgment below. *Young v. Moller*, 6 E. & B. 681; *Gann v. Johnson*, L.R. 6 C.P. 461: 40 L.J. C.P. 227.

^b *Gage v. Collins*, L.R. 2 C.P. 381: 36 L.J. C.P. 144.

^c *Beynon v. Godden*, 4 Ex. D. 246: 48 L.J. Ex. 80.

^d *Philips v. Philips*, 5 Q.B. D. 60.

^e *Archer v. James*, 31 L.J. Q.B. 153, 169, *n.* (5).

spondent to give notice of motion by way of cross appeal, but if ^{Notice.} he intends upon the hearing of the appeal to contend that the decision of the Court below should be varied, he must in the case of an appeal from a final judgment give eight days' notice, and in case of an appeal from an interlocutory judgment a two days' notice,^a or within such time as may be prescribed by special order give notice of such intention to any parties who may be affected by such contention. The omission to give such notice does not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal or for a special order as to costs (r. 6).

If the respondent gives a notice under these rules and his appeal as well as that of the appellant is dismissed, the appellant may deduct from the costs which he will have to pay to the respondent the costs occasioned by the notice.^b

So, again, where evidence has not been printed in the Court ^{Costs of printed evidence.} below, the Court below or a judge thereof, or the Court of Appeal or a judge thereof may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order (r. 12).

On an appeal from the High Court, interest for such time as ^{Interest on judgment where execution stayed.} execution has been delayed by the appeal shall be allowed, unless the Court or a judge otherwise orders, and the taxing officer may compute such interest without any order for that purpose (r. 19).

Where notice of appeal has been given, but the appellant does not enter the appeal as directed by Order 58, r. 8, the respondent is not bound and ought not to appear, but must make a substantive motion for his costs.^c

The Court of Appeal has power to direct security for costs of an appeal to be given by the appellant. Thus it is provided by Order 58, r. 15, that "such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed *under special circumstances* by the Court of Appeal." ^{Security for costs of appeal under special circumstances.} The fact that the appellant is in insolvent circumstances, and is also vexatiously and unreasonably prosecuting the appeal, is a "special circumstance" within the meaning of the rule; and the Court of Appeal in such a case ordered the appellant to

^a See rule 7.

^b The Lauretta, 4 P.D. 25 : 48 L.J. Adm. 55.

^c Webb v. Mansel, 2 Q.B. D. 117.

give security in a moderate sum for the costs of the appeal.^a

Although the Court of Appeal in that case intimated that if they were of opinion that the appellant had any reasonable ground for going on with the action they would not allow mere poverty to stand in the way of his appeal, yet it has been held in the Chancery Division that the insolvency of an appellant is *primò facie* a sufficient reason, within the meaning of rule 15, for ordering him to give security for costs, though in some cases the Court may not order him to do so.^b *Lord Cairns LC.*, however, in the case last referred to, guarded himself against deciding the question whether where the appellant is a pauper the Court of Appeal will require security for costs. The Court of Appeal has, however, refused to require an insolvent appellant to give security for the costs of appeal, where the question at issue had not been previously considered in a Court of Error.^c But the fact that the appellant is a foreigner not domiciled in England, with no assets in this country, is a "special circumstance" within the rule, sufficient to entitle the respondent to security for the costs of the appeal.^d

Applica-
tion for
security
to be made
without
unreason-
able delay.

An application for security must be made without any unreasonable delay—thus an application was held to have been made too late when made after the costs incidental to the appeal had been actually incurred by the respondent, and after the time for hearing the appeal had been fixed.^e But an application for security may be made too early, so far as regards any future costs which may be occasioned by the standing over of the appeal and the amendment of the pleadings; for there may be no such costs.^f On an application for security for costs of an appeal from the Admiralty Division, the Court of Appeal stated that in order to prevent the expense of unnecessary applications to the Court for security, it was to be understood that where the liability to give security was clear, security when asked for ought to be offered without an application to the Court, and the application, if reasonable, ought to be accepted; and that the Court in dealing with the costs of these applications would consider which of the parties had made the application necessary.^g It is

^a *Usil v. Brearley*, 3 C.P. D. 206 : 47 L.J. C.P. 323, 380.

^b *In re Ivory*; *Hankin v. Turner*, 10 Ch. D. 372, 377; see also remarks on this case in *Polini v. Gray*, 11 Ch. D. 743, 744 : 49 L.J. Ch. 41.

^c *Rourke v. White Moss Colliery Co.*, 1 C.P. D. 556, 562.

^d *Grant v. Banque Franco-Egyptienne*, 2 C.P. D. 430 : 47 L.J. C.P. 41.

^e *Grant v. Banque Franco-Egyptienne*, 1 C.P. D. 143; see also *Mayor of Saltash v. Goodman*, 43 L.T. N.S. 464 : *Weekly Notes*, 1880, p. 167.

^f *Grant v. Banque Franco-Egyptienne*, 2 C.P. D. at p. 144, *per James LJ.*

^g *The Constantine*, 4 P.D. 156.

suggested that this rule may be applicable in the case of an application for security for the costs of an appeal from the Queen's Bench Division.

The application for security is by motion, upon notice, to the Court of Appeal.

Applica-
tion how
made.
Security
how given.

The practice is for the amount of security ordered, if £30 or under, to be paid into Court ; where, however, it is more than that sum, the appellant may either pay the amount into Court or give a bond. Under Order 65, r. 7, where a bond is to be given as security, it shall, unless the Court or a judge shall otherwise direct, be given to the party or person requiring the security and not to an officer of the Court.

It is not the practice of the Court of Appeal when ordering an appellant to give security for costs to fix a time within which the order must be complied with. But if it is not complied with in a reasonable time the respondent may move to dismiss the appeal for want of prosecution. But what is a reasonable time must depend upon the circumstances of each case.^a

Order for
security to
be com-
plied with
within
reasonable
time.

There is no difference in the practice in appeals from the Chancery and Common Law Divisions on this subject.^b

The Court of Appeal will not stay the payment of costs, which have been ordered to be paid, pending an appeal to the House of Lords, if the solicitor who receives the costs personally undertakes to repay them if the decision is reversed. Nor will payment of such costs be stayed upon the ground that another proceeding in the same action is pending, under which costs *may* become payable to the party applying for a stay.^c

Stay of
payment of
costs,
pending
appeal to
House of
Lords, not
generally
ordered.

An application to stay execution will not be granted by the Court of Appeal in order to give a party who is dissatisfied with the amount of damages assessed by a jury and whose appeal therefrom to the Court of Appeal has been unsuccessful, an opportunity to decide whether he will appeal or not to the House of Lords.^d

The practice of the Queen's Bench Division to have only one taxation of costs in an action does not apply where costs are given by the Court of Appeal. The party to whom costs are ordered to be paid is entitled to have them taxed and paid

Costs given
by Court
of Appeal
taxable at
once.

^a *Polini v. Gray*, 11 Ch. D. 741 : 49 L.J. Ch. 41 ; *Vale v. Oppert*, 5 Ch. D. 633 ; *Judd v. Green*, 4 Ch. D. 784 : 46 L.J. Ch. 257.

^b *Per Brett L.J.*, *ibid.*, at p. 743.

^c *Grant v. The Banque Franco-Egyptienne*, 3 C.P. D. 202 : 42 L.J. C.P. 455 ; *see also Morgan v. Elford*, 4 Ch. D. 388.

^d *Webber v. The London, Brighton & South Coast R. Co.*, 51 L.J. Q.B.

forthwith, unless the Court gives an intimation that the taxation and payment is to be postponed.^a

Where the defendant obtained a rule absolute for a new trial in the Court of Appeal, and the plaintiff was ordered to pay the costs of the appeal and of a previous application by the defendant to the Divisional Court for a rule *nisi* which was refused, it was held that the defendant was not entitled to an order to stay the proceedings until the costs were paid.^b

^a Philips *v.* Philips, 5 Q. B. D. 60.

^b Morton *v.* Palmer, 9 Q.B. D. 89 : 51 L.J. Q.B. 307.

CHAPTER XXI.

COSTS OF ISSUES.

WHERE issues in fact or law are raised upon a claim or counterclaim, the costs of the several issues respectively both in law and fact shall, unless otherwise ordered, follow the event (Order 65, r. 2). Costs
sever
issue:

The expression "costs of issues" has been said to mean the costs of trying the issues.^a

It has already been suggested^b that the word "event" here means the event of the several issues and is not used in the sense in which it is used in Order 65, r. 1, namely the event of the cause.^c

The general rule is that where there are several issues the party in whose favour final judgment is entered, or in other words, who succeeds upon an issue which goes to the whole cause of action, is entitled to the costs of the cause.^d Part
whol
judg
signe
gene
entit
costs
caus

The successful party who is entitled to the costs of the cause is also entitled to the costs of those issues upon which he has only partially succeeded, as well as of those upon which he has wholly succeeded. Thus, where formerly a defendant succeeded on the general issue, but had failed as to several special issues, it was held that he was entitled to all the costs of the witnesses solely called to prove the general issue, and to a portion of the costs of those witnesses who were called by him partly to prove the general issue and partly to prove the special pleas.^e

An unsuccessful party is only entitled to the costs of those witnesses whose evidence related exclusively to the issues upon which he had succeeded.^f

^a *Eyre v. Thorpe*, 2 Dowl. 768.

^b *Ante* p. 16.

^c *Ante* p. 9; *Myers v. Defries*, 5 Ex. D. 180: 49 L.J. Ex. 266.

^d See *Hart v. Cutbush*, 2 Dowl. 456; *Dignam v. Bailey*, L.R. 6 Q.B. 47: 40 L.J. Q.B. 68; *Sharland v. Loaring*, 1 Ex. 375: 17 L.J. Ex. 32; *Skinner v. Shoppee*, 6 Bing. N.C. 131; *Spencer v. Hamerton*, 4 A. & E. 413.

^e *Nicholson v. Dyson*, 12 L.J. Ex. 336.

^f *Freeman v. Rosher*, 18 L.J. Q.B. 105; *Clothier v. Gann*, 13 C.B. 220:

Principle
on which
costs to be
taxed
where
there are
several
items of
claim.

Where a plaintiff sued for three items of a claim for work done, and recovered a sum in respect of one of such items only, it was ordered that he should recover such costs as one of the masters might find that he had rightly incurred in recovering the above sum, and that the defendants should recover against the plaintiff such costs as they had rightly incurred in defending themselves on those points on which they had succeeded, to be also taxed. The Court also held that the right principle upon which the costs should be taxed under the order was that the plaintiff should be allowed the general costs of the cause, but should be disallowed those costs which only applied exclusively to the parts of his claim on which he had failed; whilst the defendants should be allowed such costs only as were incurred by them by reason of the two items of claim which they had successfully resisted.^a

Distribu-
tive issues.

Where issues admit of being construed distributively, it seems that they ought to be so construed, and formerly that appeared upon the record after the trial.^b

Discretion
of master
as to appor-
tioning
costs of
issues.

The master has a wide discretion as regards the apportionment of costs of issues; and it is sometimes difficult to say what parts of the briefs, counsel's fees, &c., are applicable to the specific issues on which a party has succeeded. Where he allowed the whole of these expenses to a defendant succeeding upon the greater part of the causes of action, the plaintiff having a verdict on a trifling part of the causes of action, the Court declined to interfere.^c

The question whether certain costs are payable in respect of one issue or another is one entirely for the master to determine, and the Court in general will not interfere with his decision on the matter.^d

The master, when he has satisfied himself as to what costs of the several issues each party is entitled to, deducts from the costs of the party who has succeeded in the action, the costs of all such parts of the pleadings, of the briefs, and of such witnesses of the party who has succeeded on the specific issues as are relevant to the issues on which he has judgment and

22 L.J. C.P. 98; *Jewell v. Parr*, 25 L.J. C.P. 179; *Harrison v. Bush*, 25 L.J. Q.B. 99; 5 E. & B. 344; but see *Prudhomme v. Fraser*, 2 A. & E. 645; *Freshney v. Wells*, 26 L.J. Ex. 228.

^a *Sparrow v. Hill*, 8 Q.B. D. 479; 50 L.J. Q.B. 675; and see *Traherne v. Gardner*, 26 L.J. Q.B. 259; 8 E. & B. 161; *Reynolds v. Harris*, 28 L.J. C.P. 26; 3 C.B. N.S. 267.

^b *Paterson v. Harris*, 2 B. & S. 814; 31 L.J. Q.B. 277.

^c *Marshall*, 133; *Fazakerley v. Rogerson*, 1 L.M. & P. 747.

^d *Pilgrim v. Southampton & Dorset R. Co.*, 8 C.B. 25; *Doe d. Smith v. Webber*, 2 A. & E. 448.

which are not at all applicable to the points on which the verdict proceeds.^a

A defendant is entitled to judgment and execution for the excess (if any) of costs over those to which the plaintiff is entitled.^b Judgment for excess of costs.

A defendant is entitled to tax the costs of issues found in his favour, even though the plaintiff is deprived of all costs under section 5 of the County Courts Act, 1867. Taxation costs of issues found for defendant

It would seem that a party does not lose his right to the costs of issues upon which he has succeeded by not taxing them at the same time as the opposite party taxes his costs.^c

If a plaintiff succeeds on some issues but is nonsuited on others, and no order is made as to costs in the judgment, the defendant is entitled to the costs of the issues on which the plaintiff has been nonsuited.^d In the event of there being any ambiguity as to the costs in the judgment, the application ought to be made to the judge who tried the case to have it explained. Costs of issues upon which plaintiff is nonsuited

With regard to the apportionment of costs, where there is a claim and also a counterclaim, upon each of which the respective parties have succeeded, it has been said by *Brett L.J.* that "where there is a claim with issues on it and a counterclaim which is not a set-off (but is in the nature of a cross-action)^e with issues on it, and the plaintiff succeeds on the claim, and the defendant succeeds on such counterclaim, the taxation, if not otherwise ordered, should be by taxing the claim, as if it and the issues were an action, and by taxing the counterclaim as if it and its issues were also an action, and the allocatur for costs should be given for the balance in favour of the party in whose favour is such balance; the master on such taxation dividing the items which are common to both actions."^f Apportionment of costs where there is a claim and counterclaim.

Where there are several issues and some are found in favour of the plaintiff and some in favour of the defendant, the defendant is entitled to the costs of those witnesses who were called exclusively in support of the issues found for him, but not of those who were also examined to disprove the issues found for the plaintiff.^g Costs of several issues, some found for and some against a plaintiff.

^a See *Penson v. Lee*, 2 B. & P. 330; *Hazlewood v. Back*, 9 M. & W. 1; 11 L.J. Ex. 89; *Spencer v. Hamerton*, 4 A. & E. 413; *Gravatt v. Attwood*, 21 L.J. Q.B. 215.

^b *Twigg v. Potts*, 4 Dowl. 266; *Milner v. Graham*, 2 Dowl. 422.

^c *Watson v. Boyes*, 13 M. & W. 365; 14 L.J. Ex. 116.

^d *Abbott v. Andrews*, 51 L.J. Q.B. 641.

^e This remark was made before Order 19, r. 3, as to the effect of a counterclaim, came into force.

^f *Baines v. Bromley*, 6 Q.B. D. 691; 50 L.J. Q.B. 465.

^g *Crowther v. Elwell*, 4 M. & W. 71.

Costs of
issues
where
there are
several
defend-
ants.

Where there are several defendants, and a verdict is found for some of them and against the others, the former are only entitled to an aliquot proportion of the whole costs incurred.^a And where there are several defendants, and one alone employs one solicitor for all of them, the others are not entitled to claim any costs.^b

Costs
where
defendants
defend by
separate
solicitors.

Where several defendants defend by separate solicitors, but the work is virtually done by one, a joint charge should be made and separate bills should not be brought in for taxation.^c

If one or more defendants defend by one solicitor and others by another, and the defendants who employ the one solicitor are successful, but those who defend by the other have a verdict against them, the successful defendants are entitled to the whole of their costs.^d But where several solicitors are employed for the purpose of increasing costs, so that each defendant if successful may bring in a separate bill of costs, the master on taxation will tax as if only one solicitor had been employed, and as if there were only one bill of costs.^e But where the parties *bonâ fide* sever for the purposes of their defence and employ separate solicitors the costs of so doing will be allowed.^f

Apportion-
ment of
costs where
name of
one of
several
defendants
struck out
at the trial.

Where the name of one of two defendants was struck out at the trial, upon the terms of the plaintiff paying the costs of such defendant, and the plaintiff subsequently obtained a verdict against the other defendant, the defendant whose name was struck out was held to be entitled, in the absence of special circumstances, to a moiety of the joint costs of both defendants, although they both appeared and pleaded jointly by the same solicitor.^g The principle upon which the master will proceed on taxation is to consider what would have been the amount of the costs of the defence if both defendants had succeeded, and he will then divide this into moieties and allow one of such moieties to the defendant whose name has been struck out.

But besides being allowed his aliquot part of the joint costs,

^a Griffiths *v.* Jones, 4 Dowl. 159 : 2 C.M. & R. 333 ; and *see* George *v.* Elston, 1 Bing. N.C. 513 : 4 L.J. C.P. 167.

^b Starling *v.* Cozens, 3 Dowl. 782 : 4 L.J. Ex. 223.

^c Nanny *v.* Kenrick, 2 Dowl. 334.

^d Gray, 98 ; Griffiths *v.* Jones, *supra*.

^e Gray, 98 ; Nanny *v.* Kenrick, *supra* ; Gambrell *v.* Earl of Falmouth, 5 L.J. K.B. 253 : 5 A. & E. 403.

^f Gambrell *v.* Earl of Falmouth, *supra* ; Nanny *v.* Kenrick, *supra* ; George *v.* Elston, 1 Sc. 518 : 1 Bing. N.C. 513.

^g Redway *v.* Webber, 13 C.B. N.S. 254 : 32 L.J. C.P. 84 ; Alderson *v.* Waistell, 13 L.J. Q.B. 254 ; and *see* cases cited *supra*.

the successful defendant is sometimes entitled to be allowed extra costs which he has been obliged to incur.^a

Where a plaintiff wholly fails in an action against several defendants he is entitled to pay the costs to whichever defendant he chooses. So also if he wholly succeeds in his action against several defendants who are sued jointly he is entitled to issue execution against any one of them ; for each defendant is liable in such a case for the whole of the costs.^b

Payment of costs where there are several defendants.

Where there are several defendants and a plaintiff is ordered to pay costs to one of them, the payment should be made to the defendant in whose favour the order is drawn up and not to any of the other defendants.^c

If a juror is withdrawn at the trial, neither party is entitled to costs, but on the other hand pays his own.^d It is a positive rule of practice that when the parties agree to withdraw a juror, that puts a final end to the litigation between them, and no future action can be brought for the same cause.^e

No costs where juror withdrawn.

If the jury be discharged as to any particular issue or issues, neither party is entitled to the costs of such issue or issues.^f

Nor if jury discharged as to particular issues.

^a Gray, 96 ; Griffiths *v.* Kynaston, 2 Tyr. 757 ; Cain *v.* Adams, 5 L.J. K.B. 252 ; Bartholomew *v.* Stephens, 5 M. & W. 386 : 8 L.J. Ex. 250.

^b Wilson *v.* Foote, Bull. N.P. 335.

^c Showler *v.* Stoakes, 13 L.J. Q.B. 230.

^d Stodhard *v.* Johnson, 3 T.R. 657 ; see Burdon *v.* Flower, 7 Dowl. 786.

^e Gibbs *v.* Ralph, 14 M. & W. 804 : per Pollock C.B., 15 L.J. Ex. 7.

^f Dax, 210 ; Vallance *v.* Evans, 2 Dowl. 118 : 1 C. & M. 856 ; see also Reg. *v.* Johnson, 5 A. & E. 488 ; Allenby *v.* Proudlock, 4 A. & E. 326 ; Hill *v.* The London & South Western R. Co., 11 Ex. 696 ; Bostock *v.* The North Staffordshire R. Co., 18 Q.B. 777 : 21 L.J. Q.B. 384.

CHAPTER XXII.

POWERS AND AUTHORITY OF THE MASTERS IN RELATION
TO THE TAXATION OF COSTS.

Powers and authority of the taxing masters. THE powers and authority of the masters in relation to the taxation of costs and with regard to all proceedings necessary therefor, are derived from statutes which from time to time have been passed.^a

It may here be stated that the masters have no power to tax except where there is a judgment or order which entitles a party to costs.

Certain powers of taxing masters preserved. The taxing masters of the Supreme Court or of any Division thereof are now, under Order 65, r. 27, regulation 25, in relation to the taxation of costs to perform all such duties as have heretofore been or are by general orders directed to be performed by any of the masters, taxing masters, registrars, or other officers of any of the Courts whose jurisdiction is by the Principal Act transferred to the High Court of Justice or Court of Appeal.

The taxing masters in respect of such matters are also to have such powers and authorities as previous to the commencement of the Principal Act were, or by general orders are, vested in any of such officers. These include the examination of witnesses, directing the production of books, papers, and documents, making separate certificates or allocaturs, and requiring any party to be represented by a separate solicitor. The taxing masters also have power to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and to take accounts of what is due in respect of such costs and such other accounts connected therewith as may be directed by the Court or a judge.

Taxation where bills of costs form part of an account. Where an account consists in part of any bill of costs, the Court or judge may direct the taxing officer to assist in settling such costs, not being the ordinary costs of passing the account of a receiver, and the taxing officer, on receiving such direction,

^a See 42 & 43 Vic. c. 78 : 1 Vic. c. 30 : 7 Will. iv. & 1 Vic. c. 30, s. 23 : 6 & 7 Vic. c. 73 : Directions to Masters, Reg. Gen. H. T. 1853, &c.

shall proceed to tax such costs, and shall have the same powers, and the same fees shall be payable in respect thereof, as if the same had been referred to the taxing officer by an order; and he shall return the same, with his opinion thereon, to the Court or judge by whose direction the same were taxed (Order 65, r. 27 (26)).

A sufficient number of masters, not being less than three, shall, except in vacation, attend each day at the Central Office to tax costs. In vacation one master shall attend daily for that purpose. The taxing masters shall be selected according to a rota to be fixed by the masters (Order 6, r. 3). Attendance by masters.

The taxing masters under Order 65, r. 19 are to be respectively assistant to each other; and in the discharge of their duties and for the better despatch of the business of their respective offices, any taxing master may tax or assist in the taxation of a bill of costs which has been referred to any other master for taxation, and for ascertaining what is due in respect of such costs and in such case shall certify accordingly.^a Taxing masters to be respectively assistant to each other.

Every action in the Queen's Bench Division not proceeding in a district registry shall be assigned to one of the masters of the Supreme Court at the time and in manner provided by Order 54, and all documents and proceedings therein shall thereafter be marked with the name of the master to whom the action has become so assigned, and every application or proceeding therein which by these rules is to be heard and dealt with by a master, including taxation of the costs, shall be heard and dealt with by such master (Order 5, r. 6). Master to whom action assigned to tax the costs.

Where costs are to be borne by a fund or estate, the taxing master has authority under Order 65, r. 27, regulation 27, to arrange and direct what parties are to attend before him on the taxation of such costs. And he may disallow the costs of any party whose attendance he in his discretion may consider unnecessary in consequence of the interest of such party in the fund or estate being small or remote, or sufficiently protected by other parties interested. Taxation costs payable out of fund or estate.

Where any costs are by any judgment or order directed to be taxed and to be paid out of any money or fund in Court the taxing master, under regulation 35 of the above-mentioned rule 27, is in his certificate of taxation to state the total amount of all such costs as taxed without any direction for that purpose in the judgment or order.

And by regulation 56 of the same rule 27, where in any cause or matter any bill of costs is directed to be taxed for the purpose of being paid or raised out of any fund or property, the Taxation bill of costs.

^a See also 16 & 17 Vic. c. 73, s. 42.

taxing officer may, if he shall consider there is a reasonable ground for so doing, require the solicitor to deliver or send to his clients, or any of them, free of charge, a copy of such bill, or any part thereof, previously to such officer completing the taxation thereof, accompanied by any statement such officer may direct, and by a letter informing such client that the bill of costs has been referred to the taxing officer, giving his name and address for taxation, and will be proceeded with at the time the officer shall have appointed for this purpose, and such officer may suspend the taxation for such time as he may consider reasonable.

Liability of solicitor personally for costs improperly or fruitlessly incurred. The taxing master cannot inquire into any question of alleged negligence on the part of the solicitor, even where such negligence might have caused costs otherwise properly incurred to have proved fruitless to his client, but the Court or a judge may call upon the solicitor to shew cause why such costs should not be disallowed as between solicitor and client; and if the circumstances of the case require it, make the solicitor refund to his client any sums which the client might have been ordered to pay to any other person; or refer the matter to the taxing master for inquiry and report.

Costs improperly incurred. Thus Order 65, r. 11, directs that "if in any case it shall appear to the Court or a judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor,^a any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or judge may call on the solicitor of the person by whom such costs have been so incurred to shew cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require.

Reference of matter to master for enquiry. "The Court or judge may, if they or he think fit, refer the matter to a taxing officer for inquiry and report; and direct the solicitor in the first place to shew cause before such taxing officer, and may also, if they or he think fit, direct or authorize the official solicitor of the Supreme Court to attend and take part in such inquiry. Such notice (if any) of the proceedings or order shall be given to the client in such manner as the Court or judge may direct.

^a As to non-attendance at Judge's Chambers by solicitor or party not guilty of wilful delay or negligence *see* Order 54, rr. 6 and 7, *ante* p. 131.

“ Any costs of the official solicitor shall be paid by such parties or out of such funds as the Court or a judge may direct ; or, if not otherwise paid, may be paid out of such moneys (if any) as may be provided by Parliament.” Costs of official solicitor.

Under Order 65, r. 27 (20) a master will by order of the Court or a judge inquire into the costs of certain matters occasioned by misconduct or negligence. Thus the “ Court or judge may, at the hearing of any cause or matter, or upon any application or proceeding in any cause or matter in Court or at chambers, and whether the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence, notice requiring a statement of claim, notice to produce, admit, or cross-examine witnesses, account, statement, procuring discovery by interrogatories or order, applications for time, bills of costs, service of notice of motion or summons or other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed ; Unnecessary costs may by order of the Court or judge be disallowed by the master

“ Or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence ; and in such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties ; and in any case where such question shall not have been raised before and dealt with by the Court or judge, it shall be the duty of the taxing officer to look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so : and in the Queen’s Bench Division the master shall make such order as may be required to effect the object of this regulation.”

In any case in which, under the last preceding regulation, or any other Rule of Court, or by the order or direction of a Court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay ; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party Taxation costs and special direction the Court or judge.

entitled thereto in the same manner as costs ordered to be paid may be recovered (Order 65, r. 27 (21)).

Tender of costs before taxation where parties dissent therefrom.

Where it is directed that costs shall be taxed, in case the parties differ about the same, the party claiming the costs shall bring the bill of costs into the office of the proper taxing officer, and give notice of his having so done to the other party, and at any time within eight days after such notice such other party shall have liberty to inspect the same without fee, if he thinks fit. And at or before the expiration of the eight days, or such further time as the taxing officer shall in his discretion allow, such other party shall either agree to pay the costs, or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs; but where he makes no such tender, or where the party claiming the costs refuses to accept the sum so tendered, the taxing officer shall proceed to tax the costs; and where the taxed costs shall not exceed the sum tendered, the costs of the taxation shall be borne by the party claiming the costs (r. 27 (34)).

Neglect or delay by party on taxation.

So also where, in proceedings before the taxing officer, any party is guilty of neglect or delay, or puts any other party to any unnecessary or improper expense relative to such proceedings, the taxing officer may direct such party or his solicitor to pay such costs as he may think proper, or deal with them under regulation 21 (r. 27 (55)).

Allowances to conveyancing counsel and scientific persons.

The allowances in respect of fees to the conveyancing counsel of the Court and to any accountants, merchants, engineers, actuaries, and other scientific persons to whom any question is referred, shall be regulated by the taxing officers, subject to appeal to the Court or judge, whose decision shall be final (r. 27 (36)).

Order referring for taxation unnecessary.

Where an action or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order directed to be paid, the taxing officer may tax such costs without any order referring the same for taxation, unless the Court or a judge upon the application of the party alleging himself to be aggrieved prohibits the taxation of such costs (r. 27 (33)).

Power of taxing master to limit or extend time for any proceeding before him.

The taxing master, under Order 65, r. 27, regulation 57, has power to limit or extend the time for any proceeding before him. Also where by any general Order or any order of the Court or a judge a time is appointed for any proceeding before or by a taxing master, unless the Court or judge shall otherwise direct, he is empowered from time to time to extend the time appointed upon such terms (if any) as the justice of the

case may require, and although the application for the same is not made until after the expiration of the time appointed, it will not be necessary to make a certificate or order for this purpose unless required for any special purpose.

Where final judgment is entered in the District Registry, Taxation costs shall be taxed in such Registry unless the Court or a judge shall otherwise order (Order 35, r. 4). in district registry.

A master while sitting as a judge at chambers has no power Master at to award costs other than costs of or relating to any proceeding Chambers before a master and other than any costs which by the rules or cannot review by the order of the Court or a judge he is authorized to award ; taxation. nor has he any power to review taxation of costs (Order 54, r. 12).^a

^a See *post*, p. 180.

CHAPTER XXIII.

TAXATION OF COSTS.

Notice of taxation. BY Order 65, r. 16, one day's notice of taxing costs, together with a copy of the bill of costs and affidavit of increase (if any), shall be given by the solicitor of the party whose costs are to be taxed to the other party or his solicitor in all cases where a notice to tax is necessary.^a

Service of notice. The notice must be served during office hours, *i.e.*, before six o'clock in the evening, on any weekday except Saturdays, when it must be served before two in the afternoon. If the service is effected after 6 P.M. on any weekday except Saturday, it is deemed to have been effected on the following day; if effected after 2 P.M. on Saturday, it is deemed as effected on the following Monday.^b The affidavit of service, if required, must state when, where, how, and by whom service was effected (Order 67, r. 9).^c

By Order 65, r. 17, notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person or by his solicitor or guardian. This rule is the same as rule 61 of the Reg. Gen. Hil. Term, 1853, prior to which it had been decided upon a similar rule that a defendant who had allowed a plaintiff to enter an appearance for him was not entitled to notice of taxation;^d nor was he so entitled where, after the appearance had been so entered by the plaintiff, he had taken out a summons for time to plead, for such a proceeding was held not to be tantamount to an appearance.^e

Notice to tax may be given on the day of trial for the next

^a This rule is a reproduction of rule 59 of Reg. Gen. Hil. Term, 1853. For form of notice to tax *see* Chitty's Forms, p. 338 (ed. 11).

^b Order 64, r. 11.

^c *See* further Order 67, rr. 2, 3.

^d Marshall, 225; Pope *v.* Mann, 2 M. & W. 881; 6 L.J. Ex. 204; Burch *v.* Pointer, 3 M. & W. 310; 7 L.J. Ex. 63; Welch *v.* Vickery, 15 M. & W. 59; Bolton *v.* Manning, 5 Dowl. 769.

^e Marshall, 225; Welch *v.* Vickery, 15 M. & W. 59; Rules of Hil. Term; 4 Will. iv. s. 17.

day, on which day judgment may be signed and execution issued, where an order has been made for *immediate* execution.^a

By Reg. Gen. Hil. Term, 1853, r. 60, one appointment only shall be deemed necessary for proceeding in the taxation of costs or of a solicitor's bill.^b The party who has the conduct of the order obtains the appointment to tax. But if he neglects to attend, the solicitor for the opposite party should proceed with the taxation, and ought not to treat the appointment as abandoned.^c The taxing master will most probably in the exercise of his discretion give reasonable time to the parties if the circumstances warrant him so to do.^d By rule 154 of the same rules, it is provided also that an attendance on a summons or an appointment before a master for half an hour next immediately following the return thereof shall be deemed a sufficient attendance; and by rule 172, on every appointment made by the master, the party on whom the same shall be served shall attend such appointment without waiting for a second, or in default thereof the master may proceed *ex parte* on the first appointment.

One appointment only necessary.

Party to obtain appointment.

What attendance on appointment sufficient.

An order will be made to review the taxation of a bill of costs if the party, as for instance the plaintiff, taxes his costs and signs judgment without having given notice of taxation in a case where such notice ought to have been given.^e

Review of taxation where party taxes without notice.

It would seem that, if the costs of cross issues are intended to be taxed at the time of the taxation of the costs in the cause, it is not necessary to give notice thereof.^f

Taxation of costs of cross issues.

When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect (Order 65, r. 27 (28)).

Refusal by a party to bring in costs for taxation.

It was held in one case before the Judicature Acts that the master might tax the costs at the nominal sum of 3s. 4d., where the defendant's solicitor had refused to attend, after a peremptory appointment to tax had been made.^g

^a Alexander v. Williams, 4 D. & L. 132.

^b As to preservation of the general orders see Order 65, r. 27 (25); but see also Appendix O (16) to R.S.C. 1883.

^c Sheriff v. Gresley, 4 A. & E. 338.

^d Dax, 51; see also Order 65, r. 27 (57).

^e Marshall, 225.

^f Dax, 235.

^g Christie v. Thompson, 1 Dowl. N.S. 592.

Where the taxation has commenced, the master will adjourn it from time to time as circumstances or his own convenience as regards his other official duties may require.^a

One taxation of costs only as a rule.

The practice is to have only one taxation of costs in an action, but this rule does not apply where costs are given by the Court of Appeal,^b or are ordered to be paid forthwith.

Affidavit of increase.

The amount of the costs of the trial, including the evidence, the subpoenaing of and payments to witnesses, counsel, and Court fees, must be supported by affidavit, commonly called the affidavit of increase.^c

Materiality of witnesses to be sworn to.

In order to obtain the master's allowance for the expenses of witnesses, it is absolutely necessary that their materiality should be sworn to in the affidavit. It must also be sworn that they actually attended the trial, and that their expenses have been paid.^d It follows from this that it would not be sufficient for the deponent to swear that he "believed," or that "to the best of his belief," the witnesses had been paid; nor that he had "caused" the witnesses to be paid. The actual fact must be sworn to.^e If there be any doubt upon the point of materiality, the master will, if required, read the brief and judge for himself whether the witnesses be material or not, and allow or refuse their expenses accordingly.

It is absolutely necessary in the case of a witness who has not been called at the trial, and whose expenses are claimed, that the deponent should swear that in his opinion the witness was material, and his attendance at the trial necessary, otherwise the master would not be able to satisfactorily judge for himself in the matter where the only information is to be gathered from a perusal of the brief itself. Thus the proof of the witness might show that his evidence was material, whereas in fact, if he had been called at the trial, the contrary would have appeared.

Under the former practice, unless an affidavit of increase had been made, the allowance to witnesses in the cause was limited in the whole to forty shillings.^f

Service of copy of affidavit of increase.

A copy of the affidavit of increase (if any) must be served by the solicitor of the party whose costs are to be taxed upon the opposite party or his solicitor at least one day before taxation in all cases where a notice to tax is necessary.^g It ought

^a Dax, 51; see also Order 65, r. 27 (57).

^b Philips *v.* Philips, 5 Q.B. D. 60, and *ante*, p. 161.

^c Gray, 496; for forms of affidavit of increase see Chitty's Forms, pp. 338, 340 (ed. 11).

^d Freeman *v.* Rosher, 6 D. & L. 517: 18 L.J. Q.B. 105.

^e Cross *v.* Durrell, 29 L.J. Ex. 473.

^f Dax, 253, 254.

^g Order 65, r. 16.

also to show when and before whom it has been sworn;^a and when an affidavit of service is necessary, it must state when, where, how, and by whom the service was effected.^b

An affidavit of increase respecting the costs of the pleadings and the office fees of the proceedings down to trial is not required, because the documents themselves and the record will afford sufficient information to the master.

The question whether costs are to be taxed upon the higher or lower scale is one which does not now arise.^c Higher or lower scale

The general rule is that they are to be taxed on the lower scale. It does not seem that in any case except where a bill of costs is referred to taxation as between solicitor and client will fees be allowed on the higher scale without an order, which will only be granted on special grounds arising out of the nature and importance or the difficulty or urgency of the case.

The following are the rules which deal with this matter:—

By Order 65, r. 8, in causes and matters commenced after these rules come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed “lower scale” in Appendix N, in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this Order otherwise provided for; and in causes and matters pending at the time when these rules come into operation, to which the higher scale of costs previously in force was applicable, the same scale shall continue to be applied. Costs to be taxed generally on lower scale.

By rule 9, the fees set forth in the column headed “higher scale” in Appendix N may be allowed, either generally in any cause or matter, or as to the costs of any particular application made, or business done, in any cause or matter, if, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case, the Court or a judge shall, at the trial or hearing, or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter shall or shall not be brought to trial or hearing or to further consideration (as the case may be), so order; or if the taxing officer, under directions given to him for that purpose by the Court or a judge, shall think that such allowance ought to be so made upon such special grounds as aforesaid. Higher scale allowed on by order of Court or judge.

^a *Wheldal v. Northern R. Co.*, 13 M. & W. 9 : 2 D. & L. 246.

^b See Order 67, r. 9.

^c The following are the decisions under the annulled Rules of Court, 1875, as to allowances on the higher or lower scale:—*Chapman v. Midland R. Co.*, 5 Q.B. D. 431 : 49 L.J. Q.B. 449; *Duke of Norfolk v. Arbuthnot*, 6 Q.B. D. 279 : 50 L.J. Q.B. 384; *Goodhand v. Ayscough*, 10 Q.B. D. 71 : 52 L.J. Q.B. 97.

Costs to be
taxed on
higher
scale be-
tween soli-
citor and
client on
special
grounds.

By rule 10, upon any reference to a taxing officer to tax a bill of costs of a solicitor for the purpose of ascertaining the amount due to such solicitor in respect thereof from the person to be charged therewith, if such bill shall include charges for business done in any cause or matter, the taxing officer may allow the fees set forth in the column headed "higher scale" in Appendix N, in respect of such cause or matter, or in respect of any particular application made or business done therein, if on such special grounds as are in the last preceding rule mentioned, he shall think that such allowance ought to be so made.

Saving of
old prac-
tice.

But by rule 27, regulation 37, the rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the Principal Act, shall, in so far as they are not inconsistent with the Principal Act and these rules, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal.

Fees, &c.,
when writ
issued from
district
registry.

By regulation 43, when a writ of summons for the commencement of an action shall be issued from a district registry, and when an action proceeds in a district registry, all fees and allowances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued at the Central Office, and if the action proceeded in London shall apply to such writ of summons issued from and other proceedings in the district registry.

It was decided under the annulled Rules of Court, 1875, that a judge has no power to delegate to a master the discretionary authority given to him with reference to allowing costs on the higher or lower scale.^a

Master's
allocatur.

When a master has completed the taxation he signs a certificate or allocatur which shows the final balance which is justly due, or which ought to be refunded.^b

The certificate or allocatur is in the nature of an award between the parties, and is the property of the person in whose favour it is made.^c Unless set aside, the allocatur is final and conclusive as to the amount.^d

^a *The Corticene Floor Covering Co. v. Tull*, 27 W.R. 373; but see Order 65, r. 9, which qualifies this decision.

^b Dax, 53: Marshall, 232; for form now in use see *post* Appendix, part ii.

^c *Doe d. King v. Robinson*, 4 Dowl. 503.

^d As to this see *tit. Review of taxation*, and Order 65, r. 27 (41, 42), 6 & 7 Vic. c. 73, s. 43.

Interest on costs runs from the date of the master's certificate or allocatur.^a Interest on costs.

Where before the Judicature Acts a defendant had obtained judgment for his costs, against which judgment there had been unsuccessful appeals to the Exchequer Chamber and House of Lords it was held that interest could be allowed only upon the sum for which judgment was originally obtained in the Court below and not upon the costs of the appeals.^b

By Order 65, r. 27, regulation 39, any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any items, may at any time *before the certificate or allocatur is signed* deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance. An objection in writing must specify therein by a list in a short and concise form the items or parts thereof objected to, and the grounds and reasons for such objections. The dissatisfied party, after having delivered the objections, may thereupon apply to the taxing officer to review the taxation in respect of the same. Review of taxation.
Objection to taxation may be taken by party before allocatur signed.

Upon such application the taxing officer, under regulation 40, shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and if so required by either party he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. Reconsideration of taxation by master before signing allocatur.

And any party who may be dissatisfied with the certificate or allocatur of the taxing officer as to any item or part of an item which may have been objected to as above-mentioned may, under regulation 41, apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as he may think just. Application to judge to review taxation.

The application to the judge at chambers must be made within fourteen days from the date of the certificate or allocatur, or such other time as the Court or judge or taxing officer at the time he signs his certificate or allocatur may allow. Time within which application to be made.

The application is to be heard and determined by the judge upon the evidence which had been brought in before the taxing officer; and no further evidence is to be received upon the Evidence when taxation reviewed.

^a *Schröder v. Cleugh*, 46 L.J. Q.B. 365.

^b *Lancashire & Yorkshire R. Co. v. Gidlow*, L.R. 9 Ex. 35 : 43 L.J. Ex. 1 ; but as to taxing costs of appeal at once and obtaining the master's allocatur, *see ante* pp. 161, 176.

hearing thereof, unless the judge shall otherwise direct (regulation 42).

There is a right of appeal to the Divisional Court and also to the Court of Appeal, as in other cases, from the decision of the judge under these rules.

Allocatur when final. The certificate or allocatur of the taxing officer is final and conclusive as to all matters which have not been objected to in the manner aforesaid (regulation 41).

It is to be observed that under regulation 39 the application to a master to review his own taxation must be made before the certificate or allocatur has been signed by him. As soon as the allocatur is signed the master, *qua* taxing master, has become *functus officio*.

Master to sign allocatur before taxation can be reviewed. The certificate or allocatur must be signed before the party who is dissatisfied with the taxation can apply to the judge to review the taxation. Formerly the master stated the grounds and reasons of his decision; it may be that in some cases this will not now be necessary, because the above-mentioned regulation 40 provides that the master is to state his reasons, &c., "*if so required by either party.*"

Master cannot review. A master while sitting as a Judge at chambers has no jurisdiction to review taxation of costs.^a Under Reg. Gen. Mich. Term 1867, the parties, however, might by consent allow the master to review taxation of costs.

Court will not make order as to principle on which costs to be taxed. The Court or a judge will not before the taxation of costs make an order as to the principle upon which they are to be taxed, if objection be made to that course.^b

Discretion of judge or master: how to be exercised. The discretion which is given to a Court or judge or master is not exercised in an arbitrary manner, but is regulated by certain well-known principles upon which the Court, judge, or master act in the absence of any special circumstance. Thus it has been held that, where costs are in the discretion of the Court, they will follow the general rule of giving them to the successful party unless there are peculiar circumstances to restrain the application of the rule.^c

Court will not in general interfere with discretion. It is well established that the Court or a judge will not in general interfere and order the taxation to be reviewed on a question which depends on the discretion of the judge or master, as, for instance, where the objection is to the amount. But

^a Order 54, r. 12.

^b Dax, 64; Burton v. Burton, 29 L.J. Ex. 291; Sellman v. Boorn, 8 M. & W. 552; 10 L.J. Ex. 433; Cleaver v. Hargreave, 2 Dowl. 689; for instance under Lands Clauses Consolidation Acts see Eccles v. Mayor of Blackburn, 30 L.J. Ex. 358.

^c See Barker v. Birch, 7 Sc. N.R. 397; 1 D. & L. 816; Johnson v. Diamond, 11 Ex. 431; 25 L.J. Ex. 40.

they will interfere in cases where it has been exercised upon erroneous principles, or where it has not been exercised at all by the master.

Although the allowances for many matters or proceedings are on taxation left to the discretion of the master, yet that discretion must be exercised in a fair and reasonable way, according to the usual or established practice and allowance in respect of such matters; otherwise the Court or judge will interfere and review the discretion of a master who has not so exercised it.^a

A good illustration of the way in which the master is to exercise his discretion in respect of all fees or allowances which are discretionary is afforded by Order 65, r. 27 (38), which provides that in such a case the master is in the exercise of his discretion to take into consideration the other fees and allowances to the solicitor and counsel (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

This regulation at all events clearly lays down the principles upon which the master is to act when exercising his discretion in respect of fees and allowances which are discretionary.

The rule upon which the Court or a judge generally act in considering the question whether the taxation shall be reviewed or not, is clearly stated by *Bovill C.J.* in *Hill v. Peel*,^b a case under the Parliamentary Elections Act, 1868; but the principle there laid down is one of general application. His lordship there said: "A very wide discretion must necessarily be left to the taxing officer, which must be exercised by him after a careful consideration of the particular circumstances of each case; and where, after properly considering the matter, the master has arrived at a decision, it lies upon those who impeach his decision, to satisfy the Court that he is wrong. Where a principle is involved, the Court will always entertain the question and, if necessary, give directions to the master; but where it is a question of whether the master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the Court is generally unwilling to interfere with the judgment of its officer, whose peculiar province it is to investigate and to judge of such matters, unless there

Rule on which Court act in considering whether review of taxation to be ordered

^a Dax, 113; see further Daniell's Chanc. Pr. 1238, *et seq.* (ed. 5).

^b L.R. 5 C.P. 172, 180; 39 L.J. C.P. 89, 91; see also *Burton v. Burton*, 29 L.J. Ex. 291; *Wakefield v. Brown*, L.R. 9 C.P. 410; 43 L.J. C.P. 222; *Golding v. The Wharton Saltworks Co.*, 1 Q.B. D. 374; *Marcus v. The General St. Nav. Co.*, 35 L.T. N.S. 353; *Smith v. Baker*, 28 L.T. N.S. 669.

are very strong grounds to shew that the officer is wrong in the judgment which he has formed." In another case^a *Brett J.* said: "It is not suggested that the master has violated any principle of law or any rule of practice. The complaint is that he has not properly exercised his discretion in the amount of the allowance he has made. If I could be satisfied that he had so exercised his discretion as to produce injustice or throw an unreasonable burden upon the defendant, I should have been disposed to interfere." When applying the same principle in a more recent case,^b *Lindley J.* said: "It is the invariable practice of the Court not to interfere where the matter complained of is in the master's discretion, and he has exercised a discretion, unless some serious mistake has been made. On the other hand, where the decision of the master is upon a matter of principle, the Court will always entertain a motion to review it."^c Finally, in an earlier case,^d *Willes J.* said: "The mode of taxation was for the discretion of the master; and to induce us to interfere with that, it is not sufficient to suggest some doubt; we cannot review the master's discretion unless satisfied that he is clearly wrong. In the taxation of a long bill of costs there must always be more or less of give and take."^e

Where the master does not exercise his discretion at all, as for instance, where he does not take into consideration whether it was or was not reasonable to have incurred the costs in question—for that is the question upon taxation—an order will be made for him to review his taxation.^f

Costs of
taxation.

A reasonable sum is allowed by the master on taxation between party and party, for the bill of costs, affidavit of increase, if any, and the attendance on taxation, as well as for the fees actually paid on taxation.^g

Where
solicitor
has two
places of
business.

Where a solicitor has two places of business, the adverse

^a *Potter v. Rankin*, L.R. 5 C.P. 518, 523.

^b *Turnbull v. Janson*, 3 C.P. D. 264, 270; 47 L.J. C.P. 384.

^c As to the Court interfering with the discretion of a judge in various matters see *Strachey v. Lord Osborne*, L.R. 10 C.P. 92; 44 L.J. C.P. 6; *Hinde v. Sheppard*, L.R. 7 Ex. 21; 41 L.J. Ex. 25; *Rippon v. Joyce*, 31 L.T. N.S. 475; *In re Ilfracombe Conveyance Co.*, L.R. 4 C.P. 151; *Smith v. London and St. Katherine Docks Co.*, L.R. 2 C.P. 630.

^d *Clarke v. The Tyne Improvement Commissioners*, L.R. 3 C.P. 230, 233; 37 L.J. C.P. 110.

^e See also *Rennie v. Mills*, 5 Bing. N.C. 249; 8 L.J. C.P. 148; *Levett v. Rothwell*, 27 L.J. Ex. 6; *Knight v. Gravesend R. Co.* 27 L.J. Ex. 8; *Pobjoy v. Rich*, 27 L.J. Ex. 10.

^f *Mackley v. Chillingworth*, 2 C.P. D. 273, 279, *per Grove J.*: 46 L.J. C.P. 484; see also chap. 25.

^g *Dax*, 31.

party has the right to calculate the distance of the nearest place of business to the place where the business is done.^a

The allowance on taxation of a bill of costs is 6s. 8d., or, according to circumstances, a sum not exceeding two guineas, unless the same occupy so much time that the taxing officer shall consider that amount inadequate, in which case he may allow such further fee as he shall think proper.^b

Where a defendant pays the amount claimed on a writ specially indorsed under Order 3, r. 6, he is entitled, notwithstanding such payment, to have the costs taxed, and if more than one-sixth is disallowed, the plaintiff's solicitor must pay the costs of taxation (Order 3, r. 7).^c

Allowance
for bill of
costs.

Plaintiff's
solicitor
pay costs
taxation
where or
sixth dis-
allowed.

It would seem that where less than one sixth is taxed off the bill, the plaintiff's solicitor will not be liable to pay the costs of taxation.^d The present Rules of Court do not contain any provision as to what shall happen if less than one sixth is taxed off. But in an early case decided upon the terms of 2 Geo. ii. c. 23, s. 23, it was said by *Parke B.* that where the solicitor wilfully inserts any item of charge, even one shilling, which he must know ought not to have been charged, he is not entitled to the costs of taxation.^e

^a Dax, 32, *see post*, p. 187.

^b *See* scale *post*, Appendix I, part 1, *sub tit.* "attendances."

^c *See* Hoole v. Earnshaw, 39 L.T. N.S. 409 : C.L.P. Act, 1852, s. 8 ; repealed by 46 & 47 Vic., c. 49, sched.

^d Carpenter v. Calvert, 17 L.T. N.S. 578.

^e Holderness v. Barkworth, 3 M & W. 341, 342 : 7 L.J. Ex. 107.

CHAPTER XXIV.

THE MODES OF TAXATION.

Three
modes of
taxation.

THERE are three modes of proceeding in the taxation of bills of costs. The first mode is strictly and simply as between party and party. The second is between party and party, but where the costs are taxed as between solicitor and client, that is to say, where the opposite party has to pay the amount allowed to the successful party ; and thirdly, between solicitor and client, where the client has to pay his solicitor.

Taxation
between
party and
party.

As to the first mode of taxation, namely, between party and party, it may be stated that it applies generally to all actions and proceedings in the High Court where no particular mode of taxation has been directed or ordered by the Court or a judge or agreed upon between the parties. Costs must in every case be taxed before they can be enforced ; unless by a compromise between the parties, or by an order of the Court or a judge, a specific or lump sum in lieu of taxed costs is to be paid.^a Thus upon interlocutory applications, where the Court or a judge shall think fit to award costs to any party, the Court or judge may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross shall be paid (Order 65, r. 23).

Payment of
lump sum
for costs
upon inter-
locutory
applica-
tions.

The costs as between party and party are confined to all regular and necessary proceedings in the cause,^b and the master on taxation generally follows the scale which fixes the amount of allowances to be made, and from which he seldom departs except where under the Rules of Court a discretion is given to him to do so.^c

Usual
allowance
by master.

A solicitor will not be allowed to compromise an action on the condition that his bill of costs shall not be taxed, nor will the

^a Dax, 27.

^b *Gougenheim v. Lane*, 1 M. & W. 136 : 4 Dowl. 482 ; *Ward v. Bell*, 2 Dowl. 76 ; *Jones v. Roberts*, 2 Dowl. 374 ; *Heane v. Battersby*, 3 Dowl. 213 ; *Lewis v. Woolrych*, 3 Dowl. 692 ; *Wells v. The Mitcham Gaslight Co.*, 4 Ex. D. 1 : 48 L.J. Ex. 75.

^c *E.g.* : see Order 65, r. 27, regulations 1, 3, 4, 15, 17, 24.

Court sanction an agreement between him and the opposite party to pay more than the ordinary rate of allowance, for such agreement is not for the benefit of the client, but is exclusively for the benefit of the solicitor; and if such an agreement be entered into it is not binding on the master,^a but there is no objection to the solicitor charging less than the usual rate. The master will in such matters as the above allow the costs of all the common and regular and usual proceedings; and he will also allow such incidental costs as, although unusual, appear clearly to be necessary and are directed, or from the practice are commonly considered to be costs in the cause.^b As the costs so taxed are then limited to the costs in the cause, he will not allow any costs previous to the commencement of the action with the exception of a letter for payment of a debt or notice of action, where by statute a notice is required; nor will he allow the costs of any proceedings that appear to him to be unnecessary; and of this the Courts generally hold him to be the proper judge.^c

Thus, as to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the master to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the master to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party (Order 65, r. 27 (29)).

Unnecessary costs will not be allowed.

Again, as to delivery of pleadings, services, and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service (Order 65, r. 27 (6)); so also the fees as to perusals are not to apply where the same solicitor is for both parties (Order 65, r. 27 (7)).

Allowances where same solicitor for both parties;

Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by two or more such defendants separately, the master shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred the same shall be disallowed (Order 65, r. 27 (8)).

where on solicitor for several defendants.

^a *Woosnam v. Wood*, 1 Dowl. 681; *Tanner v. Lea*, 5 Sc. N.R. 237.

^b See tit. "costs in the cause," *ante*, chap. 18.

^c *Dax*, 28.

Costs between party and party on reference.

The master can only tax, as between party and party, costs which an arbitrator has awarded to be taxed by a master; for an arbitrator cannot on a reference at common law, unless specially authorized, award any other than common costs as between party and party.^a

Set-off of costs between the parties.

The master may allow a set-off for damages or costs between the parties, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought (Order 65, r. 14); also the costs of cross-issues.^b

Extra costs.

An unsuccessful party is not liable for extra costs payable by the successful party to his solicitor.^c

"Full costs."

If a statute gives "full costs" or "all the costs expended," the master on taxation will only tax the costs as between party and party.^d

The master will allow as between party and party such costs as are by statute or rule of Court ordered to be costs in the cause: as, for instance, if a cause is removed from an inferior Court having jurisdiction in the cause, the costs in the Court below (Order 65, r. 3).

No costs recoverable from opposite party where solicitor unqualified. Objection that solicitor is unqualified to be taken on taxation.

The successful party in legal proceedings cannot, where the solicitor who was employed by him was uncertificated, recover his costs and disbursements from the opposite party who would otherwise be liable.^e

The objection that a solicitor is not duly qualified and that a party to an action cannot therefore recover his costs must be taken before the master on the taxation of costs, and if not then taken it cannot afterwards be taken on an application to review the taxation, unless the omission be satisfactorily explained. It is not a satisfactory explanation merely to state that the applicant was not aware of the defect in the solicitor's qualification when the taxation took place; but it must also appear that by the exercise of reasonable diligence the defect could not have been discovered earlier.^f

But if a party has paid money to an unqualified practitioner he cannot recover it back from him; and to this extent it would

^a See Russell on Arbitration, p. 387; see also p. 288, as to delegating to the master the taxing of costs.

^b See as to what costs may be set off, *post*, chap. 25.

^c See *Cotterell v. Jones*, 21 L.J. C.P. 2: 11 C.B. 713.

^d *Jamieson v. Trevelyan*, 10 Ex. 748: 24 L.J. Ex. 74; *Irvine v. Reddish*, 5 B & Ald. 796.

^e *Fowler v. Monmouthshire Canal Co*, 4 Q.B. D. 334: 48 L.J. Q.B. 457: 37 & 38 Vic. c. 68, s. 12; and see *Paterson v. Powell*, 2 Dowl. 738; *Humphreys v. Harvey*, 2 Dowl. 827.

^f *Fullalove v. Parker*, 31 L.J. C.P. 239: 12 C.B. N.S. 246; *Punter v. Lord Grantley*, 3 M. & G. 295.

seem that he is entitled to recover the amount so paid from his opponent.^a

A party not a solicitor who sues or defends in person is entitled to no more than his expenses out of pocket. But a solicitor regularly qualified is allowed as between party and party to make the same charges for business done when he defends or sues in person as when he acts as solicitor for another, with the exception of certain well known charges for taking instructions, as he is not entitled to charge for instructing himself. If he employ another solicitor he is entitled to no more costs than if he sues or defends in person.^b

Party suing or defending in person. Solicitor suing or defending in person entitled to costs.

Where a solicitor has two places of business, the adverse party has a right to calculate the distance of the nearest place of business to the place where the business is done.^c Provision is made by the Rules of Court for *inter alia* the indorsement on the writ of summons of the address of the plaintiff and the name of firm, and place of business of the solicitor, or if his place of business is more than three miles from the principal entrance to the Central Hall at the Royal Courts of Justice, another proper place to be called his address for service, which is to be not more than three miles from the Central Hall where writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only agent of another solicitor, he is to add to his own name or firm and place of business the name or firm and place of business of the principal solicitor (Order 4, r. 1). Similar provision is made where a writ is issued out of the central office by a plaintiff suing in person, and also where the writ is issued out of a district registry (*See* rr. 2, 3).

Allowance where solicitor has two places of business.

Any extra costs occasioned by a departure from these provisions, as, for instance, by unnecessarily serving notices in the country, would be disallowed on taxation between party and party.^d

The second mode of taxation is between party and party, where the costs are taxed as between solicitor and client. A more liberal allowance is made on taxation of costs in this mode, which is sometimes done by a judge's order, by a rule of court, by consent of the parties, or under the terms of some statute.

Taxation between party and party, as between solicitor and client.

The principle of such taxation is, that the successful party is to be entirely free from what are usually called extra costs, but there may be circumstances where that principle is not fully carried out. For instance, there may have been expenses in-

General principle.

^a Fullalove v. Parker, *supra*.

^b Dax, 31.

^c Dax 32, and *ante*, p. 182.

^d *Id.* 54.

curring previous to the commencement of an action which, unless specially ordered or provided for, cannot be allowed by the master ; such expenses may be incurred for making searches or inquiries, or in the investigation of claims, or for preparing cases for the opinion of counsel, and fees to counsel ; and the reason why they cannot be allowed is that, in order to stay proceedings in an action between certain persons, the costs are confined to the proceedings *in* such action, and therefore cannot apply to charges incurred *before* the commencement thereof. In order to include such charges, therefore, special provision should be made in the rule, order, or consent.^a

Certain costs which might not be allowed. Journeys.

Moreover, it may happen that in the conduct of a cause certain journeys and expenses may have been incurred unknown to the opposite party, for which the client may be liable,^b but which the opposite party ought not to be called upon to pay, on the ground of surprise ; for in consenting to pay the costs to be taxed as between solicitor and client, it is generally considered only to apply to the usual costs ; and if any extraordinary costs have been incurred unknown to the other party, he ought to be made acquainted therewith, otherwise he may be obliged to pay considerable expenses wholly unknown to him and therefore never contemplated by him in the arrangement. It may also be that upon subpœnaing, or upon the attendance of witnesses at a trial, the client may think proper to have a greater number to prove certain facts than are necessary, or to pay to such witnesses more than was formerly authorized by the scale of allowances sanctioned by the judges ;^c or he may choose to have a greater number of counsel, and to give them larger fees than are warranted by the circumstances of the case.^d In such cases the master will not allow more than is customary for the occasion, although he may be directed to tax the costs as between solicitor and client ; but all such matters are generally considered to be in the discretion of the master.^e

Witnesses.

Counsel.

The Rule or Order for costs should include extraordinary costs.

If a party claims all the costs and expenses he may have in any way incurred to be taxed as between solicitor and client, care should be taken that the judge's order, or rule of court, or consent, should be so worded as to include such extra costs ;

^a Dax, 32 ; and *see* *Lipscombe v. Turner*, 4 D. & L. 125, where *Patterson J.* remarked that the general view adopted as to this mode of taxation was that the costs should be so taxed as that the successful party should have no costs at all to pay.

^b *See post*, chap. 25.

^c The allowance to witnesses is now in the discretion of the master, *see post*, chap. 25.

^d As to allowances to counsel *see post*, chap. 25.

^e Dax, 33 *et seq.*

but under any circumstances the master will always consider what are fair and proper costs to be incurred, and will at all events limit his allowance to the same extent as if the taxation proceeded as between the solicitor and his client.^a

The last mode of taxation to be considered is as between solicitor and client. Taxation as between solicitor and client

The general principle upon which the master acts upon taxation as between solicitor and client, is to allow such costs as under the circumstances he considers fair, proper, and reasonable, but he will not allow the costs of unnecessary proceedings or payments, or the expenses of unnecessary journeys or attendances, even though the same may have been taken at the express desire of the client.^b It is the duty of the solicitor to protect and advise his client, and if in the course of the action he is about to incur unusual expenses, such as the costs of shorthand notes of evidence given at a reference,^c or is about to undertake a journey,^d which will cause extra costs, he must point out to his client that the additional expenses so incurred will not be allowed to him, even if successful in the action, on taxation between party and party; and in default of so doing, the solicitor will not be entitled to charge the costs so incurred on taxation between solicitor and client.^e Unnecessary costs and expenses not allowed.

So also, if a client desires an unusual number of counsel to be employed, or larger fees to be given to them than the circumstances justify, or that there should be several consultations with counsel in the course of the proceedings, or larger payments to be made to witnesses than the general scale warranted; and although the solicitor might be entitled to be re-imbursed in respect of such matters by his client, he ought at least to inform him that the excess will not, between party and party, be allowed by the master, and that at all events it must fall upon the client.^f Extra counsel or fees.

If a solicitor uses language which leads his client to suppose that certain extra costs which it is proposed to incur would be allowed on taxation between party and party, whereas in fact they would not be so allowed, the master on taxation between solicitor and client will disallow the costs so incurred.^g

^a Dax, 34.

^b *Ibid.* 42; Smith's Chanc. Pr. vol. 1. pp. 1081, 1084 (ed. 7).

^c *In re Blyth*, 52 L.J. Q.B. 186; 10 Q.B. D. 207; see *Wells v. The Mitcham Gaslight Co.*, 4 Ex. D. 1: 48 L.J. Ex. 75.

^d Dax, 42.

^e *In re Blyth*, *supra*; *In re Smith*, 13 M. & W. 477: 14 L.J. Ex. 63; *In re Snell*, 5 Ch. D. 815, 826; *Foy v. Cooper*, 2 Q.B. 937; *In re Price*, 9 Beav. 234.

^f Dax, 42.

^g *Collins v. Brook*, 4 H. & N. 270: 28 L.J. Ex. 143.

With regard to the difference which exists between the principle upon which costs are taxed between party and party and between solicitor and client, it may be stated that it is a mistake to say that only what is necessary and reasonable to be allowed as between party and party is also reasonable as between solicitor and client. It might be reasonable to allow in the latter case what it is reasonable to allow in the former, but the converse is not true.^a

The master may determine whether business necessary, but not whether beneficial. It would seem that the master on taxation has no jurisdiction to determine whether the acts or business done for the client were useful or beneficial or not ; but he may determine what was necessary to be done, and may tax off the bill such costs as he may deem to have been unnecessarily incurred.^b

Nor can the master, unless ordered specially to do so, enter into any question of disputed retainer, or whether the solicitor was guilty of negligence, or whether he agreed to do the business for costs out of pocket.^c

Liability of solicitor personally for costs incurred improperly, negligently, &c. But if in any case it appears to the Court or a judge that costs have been improperly or without reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or judge may call on the solicitor of the person by whom such costs have been so incurred to shew cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon make such order as the justice of the case may require (Order 65, r. 11).

Reference of matter to master for enquiry. The Court or judge may, if they or he think fit, refer the matter to a master for inquiry and report, and direct the solicitor in the first place to shew cause before the master ; and may also, if they or he think fit, direct or authorize the official solicitor of the Supreme Court to attend and take part in such inquiry (*ibid.*).

^a *Per Lindley L.J. in re Blyth*, 52 L.J. Q.B. 186, 189 ; 10 Q.B. D. 207.

^b Dax, 43 ; *Cliffe v. Prosser*, 2 Dowl. 21 ; *Morris v. Parkinson*, 3 Dowl. 744 ; *Heald v. Hall*, 2 Dowl. 163 ; *Nichols v. Williams*, 11 L.J. Q.B. 190 ; 1 Dowl. N.S. 840.

^c Archb. Pr. 127 (ed. 13) ; *Jones v. Roberts*, 2 Dowl. 656 ; *Nelson v. Slack*, 2 M. & G. 820 ; *Matchett v. Parkes*, 9 M. & W. 767 ; 11 L.J. Ex. 287 ; as to directing an issue between the solicitor and client to try the question of authority *see Hammond v. Thorpe*, 1 C. M. & R. 65 ; 2 Dowl. 721 ; *Souter v. Watts*, 2 Dowl. 263.

Such notice (if any) of the proceedings or order shall be given to the client in such manner as the Court or judge may direct.

Notice to client.

Any costs of the official solicitor are to be paid by such parties, or out of such funds as the Court or a judge may direct; or if not otherwise paid, may be paid out of such moneys (if any) as may be provided by Parliament (Order 65, r. 11).

Costs of official solicitor.

The master will disallow as between solicitor and client the costs occasioned by a solicitor negligently and ignorantly commencing an action in a wrong form, which he is afterwards obliged to abandon and to commence a fresh action; for every solicitor is presumed to have a fair knowledge of his profession.^a And if in consequence of such deduction more than a sixth part is taxed off the bill, he will be liable to pay the costs of taxation.^b

The master may disallow costs of proceedings ignorantly or negligently taken.

So also if a solicitor, without any authority from the plaintiff to do so, commences an action, he will be ordered to pay the defendant's costs as between party and party, and also the plaintiff's costs as between solicitor and client.^c It is a gross fraud for a solicitor to commence an action when he knows he has no authority to do so.^d

Or taken by solicitor without authority.

If a solicitor undertakes formally to pay costs, he thereby becomes personally answerable for them, even though he may have entered into the undertaking "as solicitor" only.^e

Liability of solicitor personally on undertaking.

^a Cliffe *v.* Prosser, 2 Dowl. 21.

^b Morris *v.* Parkinson, 3 Dowl. 744.

^c Jenkins *v.* Fereday, L.R. 7 C.P. 358 : 41 L.J. C.P. 152 ; Newbiggin-by-the-Sea Gas Co. *v.* Armstrong, 13 Ch. D. 310 : 49 L.J. Ch. 231 ; Reynolds *v.* Howell, L.R. 8 Q.B. 398 : 42 L.J. Q.B. 181 ; Archb. Pr. 93 (ed. 13).

^d *Per Brett J.* in Jenkins *v.* Fereday, *supra* p. 360.

^e Iveson *v.* Conington, 1 B. & C. 160 ; Burrell *v.* Jones, 3 B. & Ald. 47 ; and see Lewis *v.* Nicholson, 18 Q.B. 503 : 21 L.J. Q.B. 311 ; Tanner *v.* Christian, 4 E. & B. 591 ; 24 L.J. Q.B. 91 ; Lennard *v.* Robinson, 5 E. & B. 125 : 24 L.J. Q.B. 275.

CHAPTER XXV.

ALLOWANCES UPON TAXATION OF COSTS.

- Costs of affidavits.** PROVISION is made by Order 38 as to giving evidence by affidavit, and that order contains certain regulations as to the form in which an affidavit is to be drawn up; and gives power to the taxing master to disallow the costs of an affidavit which is not in compliance with the provisions made, and offends by reason of being wrongly intituled, prolix, containing scandalous matters, &c. The following rules deal with cases of this description :—
- Title of affidavits.** Thus, by rule 2, every affidavit shall be intituled in the cause or matter in which it is sworn; but in every case in which there are more than one plaintiff or defendant, it shall be sufficient to state the full name of the first plaintiff or defendant respectively, and that there are other plaintiffs or defendants, as the case may be; and the costs occasioned by any unnecessary prolixity in any such title shall be disallowed by the taxing officer.
- Affidavits containing matters of hearsay.** By rule 3, affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.
- Form of affidavits.** By rule 7, every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.
- Affidavits containing scandalous matters.** By rule 11, the Court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client.

By rule 15, in cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer, in Court or in chambers, who shall send it to be filed.

Affidavits to be stamped.

An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office.

Use of office copies.

And by Order 65, r. 27 (53), in cases in which an original affidavit can be used, and to which Order 38, r. 15, applies, it shall not be necessary to take an office copy.

Use of original.

With regard to the allowances to be made on taxation as to affidavits, it is provided by Order 65, r. 27 (4), that when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit.

Allowance where there are several deponents; or where distant deponent.

And by rule 27 (5), the allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponent to settle and read over.

Affidavit in answer to interrogatories.

But by rule 27 (1), as to affidavits in answer to interrogatories and other special affidavits, the taxing officer may in lieu of the allowances for instructions, and preparing, or drawing, and attendances make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper.

Discretionary power of master to make special allowance for affidavits.

And as to drawing any pleading or other document, and this would include affidavits, the fees allowed are to include any copy made for the use of the solicitor, agent, or client, or for counsel to settle (r. 27 (2)).

Allowance for drawing affidavit includes copy.

Where provision is made, as by Order 66, r. 5, that a document, such as a deposition which has been filed, is to be printed, unless otherwise ordered, any charge for written copies of the document would most probably be disallowed on taxation. But by Order 66, r. 6, the Rules of Court as to printing depositions and affidavits to be used on a trial are not to apply to depositions and affidavits which have previously been used upon any proceeding without having been printed.

Costs of depositions.

Where any party or solicitor who is required to furnish any written copy of an affidavit under Order 66, r. 7, either refuses or for twenty-four hours from the time when the application for such copy has been made neglects to furnish the same, the person by whom such application is made is at liberty to procure an office copy from the office in which the original has been filed,

Party or solicitor refusing to furnish written copy of affidavit.

and in such case no costs are payable to the solicitor who makes default in respect of the copy applied for (Order 66, r. 7 (n.))^a

Documents
ordered by
the Court
to be
printed.

Where by any order of the Court (whether of Appeal or otherwise) or a judge, any pleading, evidence, or other document is ordered to be printed, the Court or judge may order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit (Order 66, r. 7 (o)).

Party pro-
ducing de-
ponent for
cross-ex-
amination
not entitled
to expenses
in first in-
stance.

Where the parties consent to take evidence by affidavit, under the provisions of Order 38, rr. 25, 26, & 27, and one of the parties desires to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, and due notice has been given within fourteen days after the consent to produce the deponent for cross-examination, the party who produces the deponent is not entitled to demand the expenses thereof in the first instance from the party demanding such production (Order 38, r. 28).

Effect of
non-pro-
duction of
deponent.

If the deponent is not produced, the affidavit is not to be used as evidence, unless the Court or a judge specially appoint. The costs of such affidavit would therefore be disallowed upon taxation, if the Court or a judge refuse to permit it to be used.

Attend-
ance of
solicitor at
trial, or on
reference.

The allowances for the attendance of solicitors at the trial or on a reference is a matter entirely in the discretion of the master, with which the Court will not generally interfere.

Allowance
where
hearing in
town.

A sum of 10s. is allowed by the master for the attendance of the solicitor on the hearing or trial of any cause or matter or issue of fact in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a judge with or without a jury or commissioner or referee, or on assessment of damages when the cause or matter is in the paper.^b

When the cause or matter, &c., is heard or tried, the master is to allow £1 1s. od. on the higher, and 13s. 4d. on the lower scale.

When
hearing not
in town.

When the cause or matter is not heard or tried in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent, a sum of £3 3s. od. may be allowed; together with expenses (besides actual reasonable travelling expenses) each day including Sundays at the rate of £1 1s. od.

Attend-
ance of
solicitor at
more than
one trial
at same

If the solicitor has to attend on more than one trial or assessment at the same time and place, in each case a sum of £1 11s. 6d. on the higher and £1 1s. od. on the lower scale is to

^a As to printing evidence and documents for the use of the Court of Appeal *see ante*, p. 159.

^b *See* scale of costs, *post* tit. "attendances," Appendix, part i.

be allowed. But the expenses in such case are to be rateably divided.

It is usual to allow for the attendance of a London solicitor upon a trial of the cause at the assizes in which he may be properly concerned, where the case is difficult or complicated or is of particular importance ; but where it is manifestly unnecessary for him to be present no allowance on his behalf will be made in costs.^a

If on the trial of a cause in town, the country as well as the town solicitor attends, the costs of the attendance of the country solicitor will not generally be allowed. This rule, however, is not inflexible, and the master in the exercise of his discretion will have to decide on taxation whether under all the circumstances of the case such attendance was necessary.^b

Where the country solicitor attends the trial in town for the purpose of being examined as a witness, he will only be allowed his expenses as a witness if he has employed a town agent, and if his attendance as solicitor is unnecessary.^c

Where a solicitor is party to an action and obtains a judgment in his favour, he is entitled to the same costs as if he had conducted the action as solicitor for some other person, and not merely to the costs which another person suing or defending in person would be entitled to.^d These costs, however, would not include the charges for taking instructions.^e

A solicitor who attends a trial or inquiry in the character of a witness as well as solicitor is not entitled on taxation to a greater allowance than when he attends in his professional character.^f

Under special circumstances an allowance for the attendance of both solicitor and clerk has been sanctioned where the solicitor was called as a witness but the clerk conducted the cause.^g Such allowances are, however, exceptional and not the rule.

In cases where the solicitor resides at a distance from the assize town, he is justified in being in attendance on the com-

^a Dax, 310.

^b *Bell v. Aitkin*, L.R. 3 C.P. 320 : 37 L.J. C.P. 168 ; *see also* *Potter v. Rankin*, L.R. 4 C.P. 76 : 38 L.J. C.P. 130 ; *Archer v. Marsh*, 7 Dowl. 541 ; *Leaver v. Whalley*, 2 Dowl. 80 ; *Madison v. Bacon*, 5 Bing. N.C. 246 ; *Par-sloe v. Foy*, 2 Dowl. 181 ; *Chapman v. Rodway*, 27 L.J. Ex. 7 ; *Sollery v. Flewker*, *ib.* 11.

^c *Leaver v. Whalley*, *supra*.

^d Archb. Pr. 82 (ed. 13) ; *Jervis v. Dewes*, 4 Dowl. 764.

^e Dax, 308.

^f *Ibid.* ; *see also* *Parkinson v. Atkinson*, 31 L.J. C.P. 199.

^g *Butler v. Hobson*, 7 Dowl. 157.

time and place.

Attend-
ance of
London
solicitor at
assizes
allowed
when
necessary.

Costs of
attend-
ance of
country
solicitor at
trial in
town in
discretion
of master.

A solicitor
party to an
action en-
titled to
usual costs.

Allowance
to solicitor
attending
trial as wit-
ness and
solicitor.

Solicitor
justified in
attending
on commis-
sion day.

mission day, unless the cause be appointed specially to be tried on a particular day, or unless the cause be entered in a second list for a division of a county.*

Personal
liability of
solicitor for
costs occa-
sioned by
non-at-
tendance at
trial.

But where upon the trial of any cause or matter it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the Court or judge, and which according to the practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the Court or judge shall think fit to award (Order 65, r. 5).

Attend-
ance at
Judges'
chambers.
Special
allow-
ances.

The ordinary allowance for the attendance of a solicitor on a summons at judges' chambers is 6s. 8d., or, according to circumstances, a sum not exceeding £1 1s. 0d.

But provision is made by the rules for the further allowance of fees where in the opinion of the judge or master the highest of the fees are an insufficient remuneration in the particular case.

Thus, by Order 65, r. 27, regulation 12, as to attendances at the judges' chambers, where, from the length of the attendance, or from the difficulty of the case, the judge or master shall think the highest of the fees an insufficient remuneration for the services performed ;

Or where the preparation of the case or matter to lay it before the judge or master in chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the judge or master may allow such fee, in lieu of the fee of £1 1s. provided, not exceeding £2 2s., or, where the higher scale is applicable, £3 3s., or in proceedings to wind-up a company £5 5s., as in his discretion he may think fit ;

And where the preparation of the case or matter to lay it before a judge at chambers on a summons shall have required and received from the solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the judge to deserve higher remuneration than the ordinary fees, the judge may allow to the solicitor, by a memorandum in writing, expressly made for that purpose and signed by the judge, specifying distinctly the grounds of such allowance, such fee, not exceeding £10 10s., as in his discretion he may think fit, instead of the fees of £2 2s., £3 3s., and £5 5s.

It is to be observed that the solicitor is only entitled to the special allowances with regard to the preparation of the case or matter to lay it before the judge at chambers where he has obtained from the judge a memorandum in writing, expressly

* Dax, 310.

made for that purpose and signed by the judge, specifying distinctly the grounds for making such allowance.

The judge at chambers also has power to make a party or his solicitor personally pay such reasonable costs as in his opinion have been incurred by one of the parties by reason of such party being absent from, or neglectful in not being prepared with evidence, &c., at chambers, whereby the proceedings have to be adjourned and no useful progress is made. Thus, by Order 65, r. 27 (13), as to attendances at the judge's chambers, where by reason of the non-attendance of any party (unless it be considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested. A master acting as a Judge at Chambers would also be entitled under this rule to award costs against a party or his solicitor personally for not attending at Chambers, these being costs of a proceeding before him within the exception in Order 54, r. 12, i.

Judge has power to order costs of non attendance at chambers to be paid by party or solicitor personally.

The master in his allowance for "instructions for brief" will take into consideration the number of witnesses, and their distance from the solicitor, and all the circumstances and difficulties of the case.^a He may also in his discretion allow in the charge for "instructions for brief" the reasonable expenses incurred by witnesses qualifying themselves to give evidence.^b

Allowance for instructions for brief in master's discretion. Expenses of witnesses, qualifying may be allowed.

The Court in an election case (and the principle would seem to apply to an ordinary action) would not interfere where the master in his discretion had allowed a lump sum for instructions for brief where it appeared that the items making up that sum had been brought before him so as to enable him to determine whether that sum represented reasonable and proper charges.^c

By Order 65, r. 27, regulation 49, where a cause or matter shall not be brought on for trial or hearing, the costs of, and consequent on, the preparation and delivery of briefs shall not be allowed if the taxing officer shall be of opinion that such costs were prematurely incurred.

Costs of premature preparation and delivery of briefs to be disallowed.

^a Dax, 302, 308.

^b Turnbull v. Janson, 3 C.P. D. 264 : 47 L.J. C.P. 384 ; and see Order 65, r. 27 (9).

^c Lovering v. Dawson, L.R. 10 C.P. 726 : 44 L.J. C.P. 321.

Costs of preparing for trial before notice given disallowed.

Under the earlier practice, a party was not entitled under any circumstances to any of the costs of preparing for trial, and therefore not to instructions for brief where notice of trial had not been given. Such costs were always disallowed where the plaintiff discontinued before notice of trial was given,^a and the defendant was not under any circumstances entitled to the costs of the drafts or copies of the briefs.^b

Also where judgment signed for want of defence.

So also where judgment had been signed for want of a plea, and no notice of trial had been given, the plaintiff was not entitled to the costs of preparing for trial, although the defendant had, by obtaining orders for time to plead, so prolonged the time as to necessitate such preparation being made by the plaintiff before issue joined, in order to be able to try the cause at the assizes.^c

Allowance for instructions where only one brief.

In this case the master disallowed instructions for brief, drawing and copying same, copies of documents to accompany, also the costs of preparing case and fees to counsel to advise on evidence.

Allowance for instructions for brief for hearing or trial where notice given.

The master may allow a sum of 10s. on the higher, and 6s. 8d. on the lower scale, for "instructions" for counsel to make any application to a Court or judge where there is no other brief.^d

Also a sum of £2 2s. on the higher, and £1 1s. on the lower scale, for instructions for brief on hearing or trial of action upon notice of trial or notice for judgment given, whether such trial be before a judge, with or without a jury, or before an official or special referee, or on trial of an issue of fact before a judge, commissioner, or referee, or on assessment of damages. And for such brief, and for brief on the hearing of an appeal, when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence.

The fees for "instructions for brief" apply to a hearing on further consideration in Court only where an order for accounts and inquiries was made without any hearing or trial.

It is to be remembered, however, that the fees on the higher scale will only be allowed by the master where an order to that effect has been made by the Court or a judge, or where the master has been directed to inquire whether upon certain special grounds the allowance ought to be made on the higher scale (Order 65, r. 9).

^a *Cooper v. Boles*, 2 M. & W. 733 : 29 L.J. Ex. 141.

^b *Doe d. Postlethwaite v. Neale*, 5 H. & N. 188 : 6 Dowl. 166.

^c *Freeman v. Springham*, 32 L.J. C.P. 249 : 14 C.B. N.S. 197.

^d See R.S.C. 1883, Appendix N, Costs tit. "instructions."

The master will allow to the successful party the costs of drawing briefs when necessary and proper, in addition to the pleadings. The amount allowed will depend upon the length and number of briefs, which will be limited to the number of counsel necessarily employed. The number of counsel will depend upon the importance and difficulty of the case, and the number of witnesses to be examined. In dealing with this matter, the master must be guided by the circumstances of each case, and allow accordingly. The allowance will include, in addition to pleadings, all necessary and proper observations, made for the information and proper conduct of the case by counsel. But all extraneous or unnecessary matter will be disallowed.^a

Briefs.

Allowance depends on length and number.

In order to diminish as much as possible the costs arising from the copying of documents to accompany the briefs of counsel, the master allows only the copying of such documents or parts of documents as he may consider necessary for the instruction of counsel, or for use at the trial.^b

Copies of necessary document only allowed.

The question as to what documents may be properly copied for the use of counsel, and what matters may fairly be introduced into the brief, is one for the master to decide. Thus, where the master disallowed as part of the brief copies of a correspondence which took place between the solicitors of the parties, after the cause had been made a *remanet*, with a view to referring the matter which failed, the Court refused to order the master to review his taxation.^c

But the master may allow the costs of copying into the brief, in an action for malicious prosecution, so much of the proceedings on the trial of the indictment as in his judgment were material and necessary for the information of counsel.^d

When documents, letters, &c., are copied into the brief, the solicitor is not entitled to charge for drawing that part of the brief, but the same is allowed to him as copying,^e at the rate of 4d. per folio. A folio comprises 72 words, every figure comprised in a column, or authorized to be used, being counted as one word.^f

The solicitor is only entitled to charge for drawing one brief in an action. Where more than one counsel are employed the master allows 1s. per folio for drawing the first brief and 4d. per folio

Charges for drawing briefs.

^a Dax, 296.

^b See Directions to Masters, Hil. T., 1853, r. 2.

^c *Pilgrim v. The Southampton R. Co.* 8 C.B. 335.

^d *May v. Tarn*, 12 M. & W. 730 : 25 L.J. Ex. 367 ; *In re Blyth*, 10 Q.B. D. 207 : 52 L.J. Q.B. 186.

^e Dax, 296.

^f Order 65, r. 27 (14).

for each copy of the brief. This is the charge for all documents, &c., which come under the head of mere copying.

Separate actions by different plaintiffs against same defendant.

But where there are separate actions by different plaintiffs against the same defendant in respect of nearly the same cause of action, the solicitor will be entitled to charge for drawing a brief in each of the actions as if two different solicitors had been employed, notwithstanding that the briefs may be nearly alike.^a The master, however, in the exercise of his discretion, will allow what is reasonable.

The solicitor, however, will not be allowed to charge as for full briefs where he has drawn only one full brief, and delivered a short statement only in the other actions.^b

Several actions on same instrument by plaintiff against several defendants.

But if the same plaintiff employs one solicitor in two or more actions brought upon the same instrument against different defendants, the solicitor will not be entitled to the full charges for drawing briefs in each cause, especially where it appears that the statement of the case is nearly the same in all; but the master will peruse the briefs and apportion the costs of drawing the same to the several actions. But copies of the whole being necessary in each action will be allowed.^c

Allowance where issues found different ways.

Party only entitled to costs of issues on which he has succeeded.

If some issues or parts of issues are found for the opposite party, the master will apportion the costs of those issues, and disallow on taxation between party and party the parts of the brief which relate to those issues or parts of issues.^d For a successful party is only entitled to the expense as costs in the cause of such parts of the brief as relate to the issues upon which he has succeeded. But the costs of such parts as were applicable to the issues upon which he has succeeded will be allowed, notwithstanding that they also applied to issues upon which he failed; while the other party is entitled only to such parts as were exclusively applicable to the issue or issues upon which he succeeded.^e

The same rule applies where some or one of the immaterial issues are found for the opposite party; for he is entitled to such parts of his brief as relate exclusively to that part upon which he may have succeeded, both as regards the case or documentary or other evidence.^f

Allowance for instructions for brief on special grounds.

It is also provided by Order 65, r. 27 (3), that "as to . . . the preparation of briefs if the taxing officer shall *on special grounds* consider the fee in either scale provided inadequate, he may

^a Oppenshaw v. Whitehead, 9 Ex. 384 : 23 L.J. Ex. 97.

^b Martineau v. Barnes, 1 Tidd. 666.

^d Dax, 296.

^f Dax, 301.

^c Dax, 298.

^e Marshall, 297.

make such further allowance as he shall in his discretion consider reasonable."

Where a title is in question the solicitor will be allowed for abstracting the title if necessary, and for making copies of the abstracts at least so far as is necessary for the conduct of the cause ; but if the party have already an abstract of his title in his possession or power, he will not be allowed for a fresh draft, the same being unnecessary ; and he will only be allowed for the necessary copies for counsel ; and he is entitled to a copy for each counsel. If the necessity of drawing the abstract be doubted or objected to, the necessity must be vouched by affidavit. Where it is necessary to give copies of proceedings in the Chancery Division in evidence, or where the same are expected to be produced on the other side, the expenses of such copies will be allowed ; but if they have already been made for the purposes of the suit, those copies must be used on the trial and fresh copies thereof being unnecessary will not be allowed.^a

Abstracts of title.

As regards the master's allowance for that part of the brief which relates to the evidence, he will allow or disallow the same according to the allowance or disallowance of the witnesses. If some of the witnesses are disallowed, as, for instance, where their evidence is rejected at the trial, that portion of the brief which relates to such evidence will also be disallowed.^b

Where witnesses disallowed, parts of brief relating to evidence also disallowed.

A party is not under any circumstances entitled to the costs of preparing for trial unless notice of trial has been given. He is not, therefore, entitled in such a case to the costs of the drafts or copies of briefs.^c Thus, where judgment had been signed for want of a plea and no notice of trial had been given, it was held that the plaintiff was not entitled to the costs of preparing for trial, although the defendant by obtaining orders for time to plead had so prolonged the time as to necessitate such preparations being made by the plaintiff before issue joined in order to enable him to try the cause at the assizes.^d

Costs of drafts or copies of briefs prepared before notice of trial given disallowed.

The following are the briefs to which the preceding remarks apply :—briefs on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, special case and petition before a Court or judge, sheriff, commissioner, referee, examiner, or officer of the Court when necessary and proper.^e

^a Dax, 296.

^b *Ibid.* 301.

^c Doe d. Postlethwaite v. Neale, 5 H. & N. 188 ; Cooper v. Boles, 2 M. & W. 733 : 29 L.J. Ex. 141.

^d Freeman v. Springham, 32 L.J. C.P. 249 : 14 C.B. N.S. 197.

^e See R.S.C. 1883, "Costs," tit. "Drawing pleadings and other documents" ; and *post*, Appendix I.

Cognovit or warrant of attorney. A cognovit or warrant of attorney must be filed before judgment can be signed.^a The fee upon filing is 3s. on the higher and 2s. on the lower scale. This is paid by a fee stamp impressed or adhesive on the document in question.^b

Costs to be taxed; If by the terms of the cognovit the costs are to be taxed, they must be taxed accordingly. A notice of taxation must, it seems, be given and the costs taxed as in other cases.

except where costs agreed on. If the cognovit agrees on a fixed sum for costs, then the master taxes only the usual costs of signing the judgment, and it would seem that it is not necessary to give notice of taxing these costs.^c

Concurrent writs. Although the plaintiff in any action is entitled under Order 6, r. 1, at the time of or at any time during twelve months after the issuing of the original writ of summons and subject to certain other conditions, to issue one or more concurrent writ or writs, yet upon taxation, it may be that the master in the exercise of his discretion may allow the costs of one writ only. This question would, however, depend upon the circumstances of the case, for the defendant by his conduct, as, for instance, by wilfully evading service might render the issue of one or more concurrent writs necessary, and in such a case the costs incurred thereby would probably be allowed. Under the old practice a defendant was ordinarily only liable for the costs of the writ with which he had been served.^d

So also a writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service or whereof notice in lieu of service is to be given out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction (Order 6, r. 7). The costs of concurrent writs properly issued under this rule would upon taxation of costs be allowed by the master.

Copies of pleadings for use of judge at trial. The master will also allow for two copies of the whole of the pleadings, one of which is for the use of the judge at the trial. The delivery of such copies by the party who enters the action for trial is required by Order 36, r. 30.^e

Office copies of writs, pleadings, &c. Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice will be allowed on taxation; for by Order 37, r. 4, all such office copies are now admissible

^a Reg. Gen. Hil. T., 1853, r. 25; and *see* 32 & 33 Vic. c. 62, ss. 24 to 29.

^b *See* Appendix III., *post*.

^c Archb. Pr. 759 (ed. 13).

^d *Angus v. Coppard*, 3 M. & W. 57: 7 L.J. Ex. 10: 6 Dowl. 137.

^e *See* also Order 66, as to the documents which are to be printed, and the charges and allowances to be made.

in evidence in all causes and matters, and between all persons or parties, but only to the same extent as the original would be admissible.

The Rules of Court make certain provisions as regards the parties by whom any pleading, notice, special case, petition of right, deposition or affidavit is to be printed and also as to the charges and allowances to be made for copies thereof. Thus the party on whose behalf the deposition or affidavit is taken and filed is to print the same (Order 66, r. 7, *a*).^a

Allow-
ances for
copies and
costs of
printing.

The party printing shall, on demand in writing, furnish to any other party any number of printed copies, not exceeding ten, upon payment therefor at the rate of 1d. per folio for one copy, and ½d. per folio for every other copy (r. 7, *c*).

Printed
copies to
be supplied
on pay-
ment.

As between a solicitor delivering any printed copies and his client, credit shall be given by the solicitor for the whole amount payable by any other party for such printed copies (r. 7, *d*).

The party entitled to be furnished with a print shall not be allowed any charge in respect of a written copy, unless the Court or a judge shall otherwise direct (r. 7, *e*).

Written
copy not to
be charged
for.

Except as provided by Order 55, r. 48, the party by or on whose behalf any deposition, affidavit, or certificate is filed shall leave a copy with the officer with whom the same is filed, who shall examine it with the original and mark it as an office copy; such copy shall be a copy printed as above provided where such deposition or affidavit is to be printed (r. 7, *f*).

Office copy
to be
marked.

Where any party is entitled to a copy of any deposition, affidavit, proceeding, or document filed or prepared by or on behalf of another party which is not required to be printed, such copy shall be furnished by the party by or on whose behalf the same has been filed or prepared (r. 7, *h*).

Written
copy of de-
position,
affidavit,
&c.

The party requiring any such copy or his solicitor is to make a written application to the party by whom the copy is to be furnished or his solicitor with an undertaking to pay the proper charges, and thereupon such copy is to be made and ready to be delivered at the expiration of twenty-four hours after the receipt of such request and undertaking, or within such other time as the Court or a judge may in any case direct, and is to be furnished accordingly upon demand and payment of the proper charges (r. 7, *i*).

Copy to be
applied for
in writing.

It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit or set of affidavits, and copied on every office copy and copy furnished to a party (r. 7, *k*).

Note as to
party by
whom
affidavit
filed.

^a As to manner in which the printing is to be done *see* Order 66, r. 3.

Name and address of party or solicitor to be indorsed on copy.

The name and address of the party or solicitor by whom any copy is furnished is to be indorsed thereon in like manner as upon proceedings in Court, and such party or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original of which it purports to be a copy, as the case may be (r. 7, *l*).

Folios are to be numbered consecutively.

The folios of all printed and written office copies and copies delivered or furnished to a party shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies (r. 7, *m*).

Refusal or neglect to furnish written copy.

In case any party or solicitor who shall be required to furnish any such written copy as aforesaid shall either refuse or, for twenty-four hours from the time when the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be payable to the solicitor so making default in respect of the copy so applied for (r. 7, *n*).

Where, by any order of the Court (whether of appeal or otherwise) or a judge, any pleading, evidence, or other document is ordered to be printed, the Court or judge may order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit (r. 7, *o*).

Unnecessary office copy.

In cases in which an original affidavit can be used and to which Order 38, r. 15, applies, it is not necessary to take an office copy (Order 65, r. 27 (53)). The costs of unnecessarily taking a copy would be disallowed on taxation.

Copy of affidavit of discovery not necessary.

Also it is not necessary to take an office copy of an affidavit of discovery of documents, and the copy delivered by the party filing it may be used against such party (Order 65, r. 27 (54)).

Any substantial departure from the above-mentioned regulations would be dealt with by the master on taxation, who would disallow any costs thereby.

Allowance provided by the scale for copies.

The following provisions relate to the allowances for copies.^a Copies of pleadings, briefs, and other documents where no other provision is made are to be allowed at the rate of 4d. per folio.

Allowance of copy for printer.

Where, pursuant to Rules of Court, any pleading, special case, petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when

^a See R.S.C. 1883, Appendix (N), "Costs," tit. "Copies"; see also Order 31, r. 15, as to taking copies of documents referred to in pleadings and affidavits, *ante* p. 137.

made by the officer of the Court) at 4d. per folio ; and for examining the proof print at 2d. per folio.

The amount actually and properly paid to the printer for printing is to be allowed, but not exceeding 1s. per folio ; and in addition for every twenty beyond the first twenty copies 1d. per folio is to be allowed. Allowance for printing.

Where any part shall properly be printed in a foreign language, or as a fac-simile, or in any unusual or special manner, or where any alteration in the document being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable. Document printed in foreign language.

These allowances include all attendances on the printers.

The solicitor for a party entitled to take printed copies shall be allowed for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor. Amount paid by solicitor for printed copies to be allowed.

In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes, *videlicet*, (1) of any pleading for delivery to the opposite party or filing in default of appearance, (2) of any special case for filing, (3) of any pleading or special case for the use of the Court or a judge, (4) of any affidavit to be sworn to in print, and (5) of any pleading, special case, or evidence for the use of counsel in Court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor at per folio 3d. on the higher and 2d. on the lower scale. Additional allowances.

But such additional allowances for printed copies for the Court or judge and for counsel are not to be made where written copies have been made previously to printing and are not in any case to be made more than once in the progress of the cause. Printed copies for Court or judge.

Close copies whether printed or written are not to be allowed of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing officer. Close copies.

An allowance of 5s. on the higher and 1s. on the lower scale, or 4d. per folio, is to be made for inserting amendments in a printed copy of any pleading or special case when not re-printed. Allowance for amendments.

A party who succeeds in his action will, upon the taxation of costs, be allowed such fees to counsel as, under the circumstances, appear to the taxing master to be reasonable. The solicitor must use a fair discretion as to the amount of the fees which he gives to counsel, and the master if he sees nothing unreasonable in the amount will allow the same. Counsel's fees in discretion of master.

^a Dax, 303 : Marshall, 287.

Discretion
of master
seldom in-
terfered
with.

A wide discretion as to the amount of fees to be allowed is left to the taxing master ; he must exercise this discretion after a careful consideration of the particular circumstances of the case, and where after properly considering the matter he has arrived at a decision, it lies on the party who desires to impeach his decision to satisfy the Court that he is wrong. Where a principle is involved the Court will always entertain the question and if necessary give directions to the master ; but where the question is merely whether the master has properly exercised his discretion, or where it is a question as to the amount to be allowed, the Court will generally be unwilling to interfere, unless there are very strong grounds to shew that the master was wrong in the judgment which he had formed.^a

Fees for
advice of
counsel.

By Order 65, r. 27, regulation 15, it is provided that such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by counsel, are to be allowed ; but as to affidavits a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time.

Case on
evidence.

This rule gives a discretion to the master as to the amount of fees, if any, to be paid to counsel for drawing or settling special indorsement of a writ, statement of claim, defence, and other proceedings. The fees to counsel were formerly allowed if the pleadings were special. The words of the rule are general, and leave the master at liberty to use his discretion as to allowing a case for the opinion of counsel on the evidence ; and also for a consultation of counsel on the delivery of the briefs. The latter allowance was at one time confined as between party and party to one consultation in the cause ; but now where the cause is made a remanet at the assizes or the trial is delayed for a considerable period after the consultation, the master may use his discretion in allowing a second consultation, which he will do if it appear to him from the circumstances of the case to be reasonable or necessary. But neither the opinion on evidence nor expenses of consultation can be allowed until the cause is at

Consulta-
tion.

^a Hill *v.* Peel, L.R. 5 C.P. 172, 180: 39 L.J. C.P. 89; Lockstone *v.* London, Brighton & S. C. R. Co., 12 C.B. N.S. 243; Tillett *v.* Stracey, L.R. 5 C.P. 185: 39 L.J. C.P. 93; Hargreaves *v.* Scott, 4 C.P. D. 21; Kidston *v.* Empire Marine Insurance Co. 16 L.T. N.S. 286; Hughes *v.* Birkenhead Improvement Commissioners, 16 L.T. N.S. 350.

issue.^a A plaintiff is not entitled to the costs of counsel's advice on evidence until after notice of trial has been given ;^b nor is a defendant entitled to such or any costs of preparing for trial where the plaintiff discontinues the action before notice of trial and that, even though liberty had been reserved to the plaintiff under a judge's order to set down the cause for trial before issue joined, and a special jury had been struck.^c

Case and consultation not allowed until cause at issue.

But rule 27, regulation 45, now provides that fees for conferences are not to be allowed in any cause or matter in addition to the solicitor's and counsel's fees for drawing and settling, or perusing any pleadings, affidavits, deeds, or other proceedings or abstracts of title, or for advising thereon, unless it shall appear to the taxing officer for some special reason that a conference was necessary or proper.

Fees for conferences.

As to counsel attending at judges' chambers, no costs thereof shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend (r. 27 (16)).

Attendance of counsel at judges' chambers to be certified.

This rule will apply to taxation between solicitor and client, as well as to taxation between party and party.^d

A general discretion as to the fees and allowances to the solicitor and counsel is given to the taxing master by rule 27, regulation 38, which provides that " As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances ; and where a party is entitled to sign judgment for his costs, the taxing officer, in taxing the costs, may allow a fixed sum for the costs of the judgment."

Discretionary fees and allowances.

A master may in his discretion allow additional fees to counsel upon additional papers laid before them as requested at consultation, although the additional brief contains no new matter, but merely a statement in a new form of that which had already appeared in the original brief.^e

^a Dax, 304 : Marshall, 289 ; Knight v. Gravesend R. Co., 2 H. & N. 3 : 27 L.J. Ex. 8.

^b Freeman v. Springham, 14 C.B. N.S. 197 : 32 L.J. C.P. 249.

^c Curtis v. Platt, 16 C.B. N.S. 465 : 33 L.J. C.P. 255 ; see also Ravis v. Hatton, 8 Dowl. 164 ; Doe d. Postlethwaite v. Neale, 2 M. & W. 732 : 6 Dowl. 166.

^d In re Chapman, 10 Q.B. D. 54 : 52 L.J. Q.B. 75.

^e Wakefield v. Brown, L.R. 9 C.P. 410 : 43 L.J. C.P. 222.

Retainers abolished. No retaining fee to counsel shall be allowed on taxation as between party and party (Order 65, r. 27 (44)).^a

Costs of briefing more than one counsel usually disallowed where plaintiff recovers £50 or less on contract. By Order 65, r. 12, in actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding £50, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the Court or a judge otherwise orders; and by rule 27, regulation 46, in any case in which under rule 12 of this Order the scale of costs in County Courts is applicable, the costs of briefing more than one counsel shall not be allowed, unless the taxing officer shall, for special reasons, be of opinion that briefing more than one counsel was proper.

Number of counsel to be allowed in discretion of master. The number of counsel to be allowed on taxation is a matter which is wholly left to the discretion of the master.^b The Court however will sometimes review the discretion exercised by the master, as, for instance, where it can judge of the question in dispute, and come to the conclusion that from the nature of the case more than one counsel ought to be allowed.^c The master is not bound by any general rule, but should take into consideration the nature and magnitude of the case and the number of witnesses likely to be examined. Three counsel or more will be allowed in a case of difficulty or length.

Junior appointed Queen's counsel. The mere fact of a junior having been appointed one of Her Majesty's counsel is not a sufficient reason for allowing on taxation the costs of briefs to three counsel.^d

Two junior counsel. By Order 65, r. 27, regulation 47, where the costs of retaining two counsel may properly be allowed, such allowance may be made, although both such counsel may have been selected from the outer bar.

Only one counsel is generally allowed where the action or matter is referred to arbitration; but the rule is not inflexible, and each case depends on its own particular circumstances.^e

^a This is the rule in the Chancery Division, and extends to both common and special retainers; see *Green v. Briggs*, 7 Hare 279; *Smith v. Earl of Effingham*, 10 Beav. 378; *Clark v. Malpas*, 31 Beav. 554.

^b *Sharp v. Ashby*, 12 M. & W. 732; 1 D. & L. 998; 13 L.J. Ex. 235; *Morris v. Hunt*, 1 Chitty R. 544; *Stewart v. Steele*, 4 M. & G. 669; 11 L.J. C.P. 155. The same rule is applied in the Chancery Division; for instances where two or more counsel have been allowed, see cases collected in *Morgan and Wurtzburg's Law of Costs* (ed. 2), pp. 489 *et seq.*

^c *Grindall v. Goodman*, 5 Dowl. 378; *Madison v. Bacon*, 5 Bing. N.C. 246.

^d *Per James L.J.*, Memorandum, 1875: L.R. 10 Ch. 540.

^e *Sinclair v. G. E. R. Co.*, L.R. 5 C.P. 135; 39 L.J. C.P. 165; *Hawkins v. Rigby*, 8 C.B. N.S. 271, 274; 29 L.J. C.P. 228.

Where a Queen's counsel acts as arbitrator, the ordinary scale of fees applies as in other cases ; but the master may increase the allowance where he thinks the usual allowance is insufficient.^a Queen's counsel acting as arbitrator.

To entitle the successful party to the costs of employing counsel on a commission to examine witnesses abroad, it must be shewn that special circumstances necessitated such employment. It is not sufficient to contend that because the other side employed counsel therefore the successful party was also obliged to do so.^b Employment of counsel on commission abroad.

But the Court refused to interfere with the discretion of a master who, on the taxation of costs in an action on a policy of insurance where the questions involved were of an extremely complicated and involved character, and after having duly considered all the circumstances allowed the expenses of sending a barrister as commissioner to examine witnesses in the Canaries.^c

Formerly, where notice was given by the plaintiff of bringing on the cause as undefended and the defendant did not appear at the trial, and the plaintiff had only to appear in Court to take a verdict, only one brief to counsel for the plaintiff was allowed ; but when no such notice was given and there was reasonable ground to expect that the defendant would appear and defend the cause, two briefs to counsel were usually allowed.^d Undefended cases.

A party, although issues may have been found against him, who is entitled to the costs of the cause, is generally allowed the whole of the fees properly paid to counsel.^e

If several defendants defend *bonâ fide* by different solicitors, One counsel defending several defendants with different solicitors. but at the trial join in delivering one brief and employing one counsel, and one defendant succeeds and one fails, the successful defendant is entitled to the whole of his costs, exclusive of the brief and counsel's fees, and to a half of those,^f *i.e.*, the successful defendant is allowed all his separate costs and *primâ facie* an aliquot part of the joint costs unless the master in the exercise of his discretion is satisfied that some smaller pro-

^a Sinclair *v.* G. E. R. Co., *supra* ; for scale see Appendix, *post* ; Scott's Costs, 351.

^b Lecocq *v.* S.E.R. Co., 7 B. & S. 415.

^c Yglesias *v.* Royal Exchange Assurance Corporation, L.R. 5 C.P. 141 : 39 L.J. C.P. 173 ; see also Potter *v.* Rankin, L.R. 4 C.P. 76 : 38 L.J. CP. 130 ; Mann *v.* Harbord, L.R. 5 Ex. 17 : 39 L.J. Ex. 27.

^d Dax, 297 : Marshall, 291.

^e Marshall, 292 ; Fazakerley *v.* Rogerson, 1 L. M. & P. 747.

^f Gray, 98 ; Bartholomew *v.* Stephens, 5 M. & W. 386 : 7 Dowl. 808 : 8 L.J. Ex. 250.

portion should be allowed by reason of any other special circumstances.^a

Number of
counsel on
writ of in-
quiry.

By the directions to taxing masters, Trin. Term, 1870, which have not been annulled by the rules of the Supreme Court, 1883, it is directed that "on taxation of costs on a writ of inquiry the master should allow only for one counsel, unless in the exercise of his discretion on all the circumstances of the case, including the amount in dispute, he is satisfied that there was more to do in the case than could reasonably be imposed on one counsel only." Thus two counsel have been allowed on a writ of inquiry to assess damages in an action of negligence arising out of a railway accident.^b Although the above-mentioned general order may not now be absolutely binding on the master, it may still serve as a guide whether, in the exercise of his discretion, he shall allow more than one counsel. In order to get the costs of counsel's attendance and briefs allowed for attending the execution of a writ of inquiry, it is advisable to give notice thereof to the opposite party.^c

Refreshers.

Formerly no refresher fee to counsel was allowed, unless the cause went over to another term; but the practice is now regulated by Order 65, r. 27, regulation 48, which provides that as to refresher fees, when any cause or matter is to be tried or heard upon *viva voce* evidence in open Court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours shall have expired, the following fees:

To the leading counsel	from 5 to 10 guineas.
To the second, if three counsel	3 to 7 "
To the third, if three counsel, or the second, if only two	3 to 5 "

The like allowances may be made where the evidence in chief is not taken *viva voce*, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses, whose affidavits or depositions have been used.^d Formerly if a trial lasted more than one day, the master might allow refreshers, when proper, as between party and party.^e

^a Marshall, 42; Gambrell v. Earl of Falmouth, 5 A. & E. 403; Bartholomew v. Stephens, *supra*; Griffiths v. Jones, 2 C.M. & R. 333; Norman v. Climenson, 4 M. & G. 243.

^b Vines v. London, Brighton & S. C. R., L.R. 5 Ex. 201; 39 L.J. Ex. 175.

^c Archb. Pr. (ed. 13), p. 812.

^d See Order 36, r. 40, and Turnbull v. Janson, 3 C. P. D. 264; 47 L.J. C.P. 374.

^e Lawrie v. Wilson, L.R. 10 C.P. 152; 44 L.J. C.P. 87.

The practice also formerly was not to allow a fee to counsel on attendance to hear judgment after argument,^a upon the ground, it may be, that his attendance was not necessary, inasmuch as he had no duties to perform. But now, inasmuch as it may become necessary to counsel, after the delivery of the judgment, to make an application in respect of the costs of the cause, or of interlocutory proceedings therein, or of any other matter, and further as a fee is allowed, by the scale of allowances, for the attendance of the solicitor to hear judgment delivered, it may be that the master now has power, having regard to the circumstances of a case, to allow a fee to counsel for attending to hear judgment delivered.

The allowances for fees to counsel on briefs in the Court of Appeal are the same as those in the Court below.^b

By Order 65, r. 27, regulation 52, "no fee to counsel shall be allowed on taxation unless vouched by his signature."

The allowances to be made to counsel's clerks are regulated by Order 65, r. 27, regulation 51, as follows:—

The following fees are to be allowed to counsel's clerks:—

	£	s.	d.
Upon a fee under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 guineas and under 20 guineas	0	10	0
20 guineas and under 30 guineas	0	15	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards, per cent.	2	10	0
On consultations, senior's clerk	0	5	0
On consultations, junior's clerk	0	2	6
On conferences	0	5	0
On retainers (where allowed):			
General retainer	0	10	6
Common retainer	0	2	6

As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances; and where a party is entitled to sign judgment for his costs, the taxing officer, in taxing the costs, may allow a fixed sum for the costs of the judgment (Order 65, r. 27 (38)).

^a Dax, 305; Marshall, 291.

^b Wegmann v. Corcoran, 41 L.T. N.S. 792.

Special
allowances
for special
indorse-
ments, &c.

As to writs of summons requiring special indorsement, and as to special cases, pleadings, and affidavits in answer to interrogatories, and other special affidavits, and admissions under Order 32, r. 4, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, and attendances, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper (Order 65, r. 27 (1)).

Fees for
drawing
document
include
copy.

The fees allowed for drawing any pleading or other document include any copy made for the use of the solicitor, agent, or client, or for counsel to settle (r. 27 (2)).

Instruc-
tions to sue
or defend.

As to instructions to sue or defend, or the preparation of briefs, if the taxing officer shall on special grounds consider the fee in either scale provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable (r. 27 (3)).

Affidavits.

As to affidavits, where there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit (r. 27 (4)).

Costs of
advice of
counsel.

Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by counsel, are to be allowed; but as to affidavits, a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time (r. 27 (15)).

Applica-
tions to ex-
tend time.

The costs of applications to extend the time for taking any proceedings are also in the discretion of the taxing officer, unless the Court or judge shall have directed how the costs are to be paid or borne. The taxing officer is not to allow the costs of more than one extension of time unless he is satisfied that such extension was necessary and could not with due diligence have been avoided (r. 27 (24)).

The costs of a summons to extend time are not to be allowed in cases to which rule 8 of Order 64 applies (*i.e.*, in cases of enlarging, by consent in writing without application to the Court or a judge, the time for delivering, amending, or filing any pleading, answer, or other document), unless the party taking out the summons has previously applied to the opposite party to consent and he has not given a consent to a sufficient extension of time, or the taxing officer shall consider there was a

good reason for not making such application. In case the taxing officer does not allow the costs of such summons, and shall consider that the party applying ought to pay the costs of any other party occasioned thereby, he may direct such payment or deal with such costs in the manner provided by regulation 21 (Order 65, r. 27 (24)).^a

Formerly certain statutes were passed which gave a successful party double or treble costs, as the case may be, and upon taxation the master allowed such costs; but it is unnecessary to refer to them in detail since the passing of 5 & 6 Vic. c. 97, which repealed all the provisions of general and local Acts which gave double or treble costs; and, in the case of general Acts which gave double or treble costs, provided that an indemnity should be given instead.

Double or treble cost abolished.

Thus, by sect. 1, "so much of any clause, enactment, or provision in any Act or Acts, commonly called public, local, and personal, or local and personal, or in any Act or Acts of a local or personal nature, whereby it is enacted or provided that either double or treble costs or any other than the usual costs between party and party shall or may be recovered, shall be and the same are hereby repealed; provided always that in lieu thereof the usual costs between party and party shall and may be recovered, and no more."

Also, by sect. 2, "so much of any clause, enactment, or provision in any public Act or Acts not local or personal, whereby it is enacted or provided that either double or treble costs or any other than the usual between party and party shall or may be recovered, shall be and the same are hereby repealed: provided always that instead of such costs the party or parties heretofore entitled under such last-mentioned Acts to such double, treble, or other costs shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

Indemnity substituted for double or treble costs given by public Acts.

The right of a party to double or treble costs can only arise now under some enactment passed subsequent to 5 & 6 Vic. c. 97.

Since the passing of the last-mentioned statute it has been enacted by 8 & 9 Vic. c. 100, s. 105, that the defendant in an action brought under the provisions of that section for anything done in pursuance of that Act shall be entitled to double costs where a verdict is given for the defendant or where the plaintiff

Exception

^a As to regulation 21 *see ante*, p. 171.

is nonsuited, discontinues the action or suffers judgment upon demurrer.

Mode of calculating double or treble costs formerly. It may be stated in passing that it was formerly the practice for the master, where a party was entitled to double costs, to add one half of his entire costs to that sum, and if entitled to treble costs one half of such half was also added; that being the mode in which double and treble costs were calculated.^a

Double or treble damages include costs. So also it was held that where an Act of Parliament gave treble damages for a cause of action for which at common law a party would only be entitled to single damages, treble costs followed as of course, but where a statute gave treble damages where none were recoverable at common law treble costs were not included.^b The same rule applied where double damages were given by statute.^c

Evidence and allowances to witnesses. By Order 65, r. 27, regulation 9, it is provided that "as to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed."

In general the allowance to witnesses is left to the discretion of the master, which in this matter is very wide under the present Rules of Court. Formerly there was a scale of allowances to witnesses from which the master, except under very extraordinary circumstances, did not depart. But it is submitted that although the master is not now bound by that scale, yet it will still serve as a guide as to the allowances to be made to witnesses.^d

Attendance of witness at trial. The master, however, is enabled by regulation 9 to allow so much for the attendance of witnesses at the trial as in his discretion shall appear to him to be just and reasonable.^e

Number of witnesses to be allowed in discretion of master. The number of witnesses to be allowed is a matter within the discretion of the master; but the general rule is that each party is entitled to the costs of witnesses whose evidence was exclusively applicable to the issues upon which he succeeded; but the party entitled to the costs of the cause is also entitled to the costs of witnesses whose evidence was material to issues upon which he succeeded, although also applicable to issues upon which he failed.^f

The master will not on taxation make any allowance for the

^a Marshall, 251; see also Tidd's Pr. (ed. 8), 1025; Staniland v. Ludlow, 4 B. & C. 889; Buckle v. Bewes, 6 D. & R. 1; but see Wilson v. The River Dun Company, 7 Dowl. 371.

^b Deacon v. Morris, 2 B. & Ald. 393; 1 Chitty 137.

^c Wilkinson v. Allot, Cowp. 366.

^d See Appendix, Part ii., *post*.

^e Turnbull v. Janson, 13 C.P. D. 264; 47 L.J. C.P. 384.

^f Marshall, 267, 297; Nicholson v. Dyson, 11 M. & W. 545, 548; 12 L.J. Ex. 336; Pilgrim v. Southampton & Dorchester R. Co., 8 C.B. 25.

subpœnaing of or payments made to witnesses if they do not appear at the trial; even though they may be sworn to as being and appear in the brief to be material and necessary witnesses. But the fact of witnesses not being called at the trial is no ground for disallowing their expenses; provided that the master is satisfied that their attendance was reasonably necessary; for it frequently happens at the trial that facts or circumstances are then admitted which render it unnecessary to call a particular witness,^a or the other side fail to make out a *prima facie* case^b or to repel a defence set up by the pleadings and in support of which the defendant therefore has given no evidence.^c

Witness not allowed if he does not appear at trial; but may be allowed although not examined.

If after notice of trial has been given the pleadings are altered so that certain witnesses who have been subpœnaed become unnecessary, the party who has subpœnaed them must make reasonable efforts to prevent their attendance or their expenses will not be allowed; but if the alteration was made too late to prevent them setting out on their journey, their expenses will be allowed.^d

Witnesses rendered unnecessary by alteration of pleadings should be countermanded.

If a witness does not arrive at an assize town until after the cause for which he has been subpœnaed is referred to arbitration, the party who is entitled to the costs of the cause will not be allowed the expenses of the attendance of such witness as costs in the cause.^e If the witness attends at the reference his expenses will be costs of the reference and not of the cause.

Arrival of witness at assizes after cause referred.

The expenses of a witness who is rejected by the judge at the trial is, as a general rule, disallowed on taxation as between party and party.^f The same rule applies to a witness rejected by an arbitrator; and whether rejected on a sufficient or insufficient ground.

Expenses of witness rejected disallowed.

A party is not necessarily disentitled to the costs of witnesses called in support of an issue on which he succeeds, because their testimony may in a slight degree be applicable also to an issue upon which he has failed.^g

Witness supporting successful and unsuccessful issues allowed.

^a Dax, 247; Morison v. Harmer, 5 Scott 410; Davis v. Thomas, 5 Jur. N.S. 709.

^b Marshall, 267; Miller v. Thomson, 4 M. & G. 260; 11 L.J. C.P. 224; Bagnall v. Underwood, 11 Price 510; Adamson v. Noel, 2 Chitty 200; Paddock v. Forrester, 4 M. & G. 775; 2 Dowl. N.S. 125.

^c Empson v. Fairfax, 8 Ad. & E. 296; Hodgkinson v. Wyatt, 4 Q.B. 749; 13 L.J. Q.B. 73; Fisher v. Berrell, 11 L.J. Q.B. 130; 1 Dowl. N.S. 365.

^d Dax, 242; Marshall, 267; Allport v. Baldwin, 2 Dowl. 599.

^e Fryer v. Sturt, 24 L.J. C.P. 154; 16 C.B. 218.

^f Galloway v. Keyworth, 15 C.B. 228; 23 L.J. C.P. 218; Speeding v. Young, 16 C.B. N.S. 824; 33 L.J. C.P. 286; Jones v. Tobin, 4 Bing. N.C. 123; 5 Scott 440.

^g Jewell v. Parr, 17 C.B. 636; 25 L.J. C.P. 179; Eades v. Evarett, 3 Dowl. 687.

Allowance
to witness
although
not sub-
pœnaed,
or where
subpœnaed
by both
sides.

The expenses of a witness although not subpœnaed ought to be allowed if he is present at the trial and gives material evidence.^a Where a witness is subpœnaed by both sides, he is only entitled to the same allowance in the whole as if he had been subpœnaed by one side only.^b The successful party is moreover entitled to be re-imbursed any payments made by him to a witness who is called by him, although the witness may have also been called and paid by the other side ;^c for a witness who is subpœnaed by both parties is not on that account entitled to any larger allowance than he would have been entitled to if he had been called by one party only.

Attend-
ance of
party as
witness.

The expenses of the attendance of one of the parties at the trial in order to give evidence on his own behalf may be allowed if the evidence was material and necessary.^d

Solicitor
called as
witness.

If the partner of one of the parties' solicitors who are conducting the cause is called as a witness, the Master may in the exercise of his discretion allow as between party and party the costs of such attendance ;^e so also where the country solicitor and his town agent are necessary witnesses.^f

Travelling
expenses.

A witness is entitled to be reimbursed the sums which have been reasonably and actually paid as travelling expenses.^g Such as going to, staying at and returning home from the place of trial.^h Formerly one shilling per mile was the maximum allowance ; but this was not an inflexible rule.ⁱ If the witness lived within the bills of mortality and was required to attend at Westminster or in London, a shilling only was usually given to him, and the Master allowed only that sum on taxation.^j The Master might allow less than that sum taking into con-

^a Marshall, 268.

^b Dax, 245 ; Benson *v.* Schneider, 7 Taunt. 337 ; see Allen *v.* Yoxall, 1 Cf & K. 315.

^c Benson *v.* Schneider, *supra*.

^d Howes *v.* Barber, 18 Q.B. 588 : 21 L.J. Q.B. 254 ; Clothier *v.* Dann, 13 C.B. 220 : 22 L.J. C.P. 98 ; Flower *v.* Gardner, 3 C.B. N.S. 185 : 27 L.J. C.P. 56.

^e Butler *v.* Hobson, 5 Bing. N.C. 128 : 5 Scott 824.

^f Chapman *v.* Rodway, 27 L.J. Ex. 7 ; Sollery *v.* Flewker, 27 L.J. Ex. 11.

^g The following extracts as to certain allowances to witnesses and their attendants are taken from a MS. book, nearly a century old, which formerly belonged to one of the Prothonotaries of the Court of Common Pleas :— "If a female witness cannot ride, allow for a man to ride before her per day, 2s. 6d." ; also "it has been common to allow in a lump sum for a witness from London to York, or *vice versa*, 200 miles, £15 15s."

^h Marshall, 272 ; as to allowing travelling expenses to expert see Churton *v.* Frewen, 15 W.R. 559.

ⁱ Directions to Masters, Hil. Term, 1853 ; Hunter *v.* Liddell, 16 Q.B. 402 : 20 L.J. Q.B. 200 ; Radcliffe *v.* Hall, 3 Dowl. 802.

^j Archb. Pr. (ed. 13), 454.

sideration the position in life of the witness and the suitable mode of travelling therefor, and also the state of health of the witness.^a But in no case ought the master to allow more than has been actually paid for the witness's travelling expenses.^b

If a witness attends in one action only, he will be entitled to the full allowance; but if he attends in more than one action he will be entitled to a proportionate part in each action only.^c

Witness attending in several actions.

A witness is not entitled to be paid compensation for loss of time in attending the trial^d nor can he maintain any action for contingent losses.^e But additional allowances for loss of time are in practice made by the master who is the sole judge in the matter in the case of a professional man (*e.g.* a physician, surgeon, solicitor and the like) upon the ground that from the nature of his avocation he is unable to find a substitute.^f

Loss of time.

Any officer of the Central Office who is required to attend with any record or document at any assizes or at any court or place out of the Royal Courts of Justice is entitled to require that the solicitor or party desiring his attendance shall deposit with him a sufficient sum of money to answer his just fees charges and expenses in respect of such attendance and undertake to pay any further just fees charges and expenses which may not be fully answered by such deposit. (Order 61, r. 29.)

Deposit of expenses of officer of Central Office as witness.

Under Order 67, rule 27, regulation 9, the master will in his discretion be at liberty to allow so much for the attendance of a scientific witness at the trial as may seem to him to be just and reasonable.^g The master may also allow in the charge for 'instructions for brief' the reasonable expenses incurred by a scientific witness in qualifying himself to give evidence. Formerly these expenses could under no circumstances be recovered as between party and party;^h but the chancery practice is now followed and the costs of witnesses qualifying themselves for examination will be allowed. The words of the rule "procuring evidence" are not to be confined to producing

Scientific witnesses.

Expenses of witness qualifying to give evidence are allowed.

^a *Dixon v. Lee*, 3 Dowl. 259 : 1 C.M. & R. 645.

^b *Radcliffe v. Hall*, 3 Dowl. 802.

^c See Table of Allowance, Hil. Term, 1853; *Griffin v. Hoskyns*, 1 H. & N. 95.

^d *Willis v. Peckham*, 4 Moo. 300 : 1 Br. & B. 515; *Collins v. Godefroy*, 1 B. & Ad. 950 : 1 Dowl. 326 : 9 L.J. K.B. 158.

^e *Thelluson v. Staples*, 2 Dougl. 438; *Moor v. Adam*, 5 M. & S. 156.

^f *Skelton v. Steward*, 1 Dowl. 411; *Doe d. Smith v. Webber*, 2 A. & E. 448.

^g *Turnbull v. Janson*, 3 C.P. D. 264 : 47 L.J. C.P. 384; *Mackley v. Chillingworth*, 2 C.P. D. 273 : 46 L.J. C.P. 484; *Maclaren v. Holme*, 7 Q.B. D. 477.

^h *Gray*, 502 : *Marshall*, 277, and cases there cited; see *Nolan v. Cope-*
man, L.R. 8 Q.B. 84 : 42 L.J. Q.B. 44.

a witness or a document before the Court;^a they would therefore now include the costs of surveying and reporting upon property the subject matter of the action;^b also the costs of qualifying a witness to speak to a person's identity;^c the expenses incurred in searching for a subscribing witness;^d also successful searches for pedigree^e and the like.^f

Searches
and trans-
lations.

The fees of an antiquary for searches and translations of ancient documents having reference to the subject in dispute are proper to be allowed.^g A fee of seven guineas for each day that a scientific witness was engaged reading up a case for the purpose of giving evidence upon it has been held to be a moderate and proper allowance.^h So also reasonable charges may be allowed to an accountant who is employed to examine and verify the books of a trader.ⁱ

Test is
whether
expenses
reasonably
incurred.

All these are matters in the discretion of the master. The question on taxation is whether such costs have been reasonably incurred. It is the invariable practice of the Court not to interfere where the matter is in the master's discretion and he has exercised it, unless some serious mistake has been made; but on the other hand where the decision of the master is upon a matter of principle the Court will always entertain a motion to review it.^j

Inter-
preter.

The expenses of an interpreter are allowed if necessary. Thus the expenses of a witness at the trial to explain and translate ancient records or foreign letters which are evidence in the action even though produced by the opposite party may be allowed on taxation between party and party.^k

Maps,
plans and
models
may be
allowed.

The master will make such allowance for maps, plans, and models^l as under the particular circumstances of each case may

^a *Per Lindley J.* in *Mackley v. Chillingworth*, 2 C.P. D. 273, 280 : 46 L.J. C.P. 484.

^b *Gravatt v. Attwood*, 21 L.J. Q.B. 215 ; *Mackley v. Chillingworth*, *supra* ; *May v. Selby*, 4 M. & G. 142 : 4 Sc. N.R. 727.

^c *Small v. Batho*, 21 L.J. Q.B. 254.

^d *Laing v. Bowes*, 3 M. & S. 89.

^e *Johnson v. Lawson*, 2 Bing. 341.

^f *Whitehouse v. Penn*, 9 Moo. 644, n. (b.)

^g *Duke of Beaufort v. Earl of Ashburnham*, 13 C.B. N.S. 598 : 32 L.J. C.P. 97 ; *Daniel v. Wilkin*, 8 Ex. 156 ; *Bastard v. Smith*, 10 Ad. & E. 213 ; *Churton v. Frewen*, 15 W.R. 559.

^h *Smith v. Buller*, L.R. 19 Eq. 473 ; *Batley v. Kynoch*, L.R. 20 Eq. 632 : 44 L.J. Ch. 565.

ⁱ *In re Laffitte & Co.*, L.R. 20 Eq. 650 : 44 L.J. Ch. 633.

^j *Turnbull v. Janson*, 3 C.P. D. at p. 270, *per Lindley J.*

^k *Bastard v. Smith*, 10 Ad. & E. 213 : 8 L.J. Q.B. 242 : Dax, 251.

^l Formerly an allowance was made for models, *see Bayley v. Beaumont*, 11 Moo. 497.

seem to him just and reasonable. It is a matter for the discretion of the master whether these allowances ought or ought not to be made ; and this will depend upon whether the maps, plans or models were reasonably required for the purposes of assisting the Judge and jury at the trial.^a Under the old scale of allowances it was ordered that no allowance should be made for maps, plans or models in cases under £20 ; but that an allowance might be made of from £1 1s. to £3 3s. for maps or plans when used in cases above £20.^b The master however, as already pointed out, is left untrammelled by this scale and can make such allowances as in his discretion seem just and reasonable.

A party or his solicitor is bound to have the witnesses in attendance from the commencement of the assizes ; expenses so incurred will generally be allowed.^c It is a question for the discretion of the master whether he shall allow a witness for the whole time of his attendance at the assizes or for only a portion of it.^d But except under special circumstances the expenses of the attendance of a witness on the commission day at the assizes are not allowed.^e Although, as before pointed out,^f the old scale of allowances to witnesses is no longer binding on the master on taxation, yet it will still serve as a guide as to the amount to be allowed in different cases to different classes of witnesses ; such as professional witnesses, country witnesses and the like.^g

Length of
time wit-
nesses to
attend.

Formerly a professional witness was entitled to his expenses on the scale allowed to persons of his profession although he was not called to give professional evidence.^h Thus, the Court refused to order a master to review his taxation where he had allowed the expenses of a solicitor, who was called as a witness but who did not give professional evidence, on the higher scale allowed to professional witnesses.

Allowance
to profes-
sional wit-
ness.

The costs of witnesses on an inquiry before an arbitrator are costs of the reference ; and are usually taxed as between party and party.ⁱ The principles upon which the allowances are made are the same as in the case of allowances in an action.

Costs of
witnesses
before arbi-
trator.

^a *Pilgrim v. Southampton & Dorset R. Co.*, 8 C.B. 25 ; *Holmes v. Holmes*, 2 Bing. 75 ; 9 Moo. 158.

^b *Directions to Masters*, Hil. Term, 1853.

^c *Cosgrave v. Evans*, 2 Dowl. 443.

^d *Platt v. Greene*, 2 Dowl. 216 ; *Fryer v. Sturt*, 16 C.B. 218 ; 24 L.J. C.P. 154.

^e *Harvey v. Divers*, 16 C.B. 497.

^f *Ante*, p. 214.

^g For scale *see* Appendix, *post*.

^h *Parkinson v. Atkinson*, 31 L.J. C.P. 199.

ⁱ *Eccles v. Blackburn*, 30 L.J. Ex. 358 ; *Fryer v. Sturt*, 24 L.J. C.P. 154.

Witness re-
jected by
arbitrator.

Thus the expenses of a witness who is rejected by an arbitrator, including the cost of his attendance either at the assizes when the action was referred, or before the arbitrator, will not be allowed on taxation as between party and party.^a

Subsis-
tence
money.

It is a well established rule that a witness who is detained in this country for the purpose of giving evidence at the trial is entitled to be paid the expenses of such detention. This is called subsistence money. The amount to be allowed and the period during which subsistence money is to be paid are matters for the discretion of the master.

Principle
on which
subsistence
money al-
lowed.

Thus, where the captain of a ship was detained in this country for a period of eighteen months, viz., from the issuing of the writ until the trial of an action upon a policy of insurance the Court refused to interfere with the decision of the master who had allowed subsistence money at the rate of 10s. a day during that period.^b The conduct of the captain was impugned and it was therefore admitted that his personal attendance at the trial was necessary: moreover as he was a person who was usually away on long voyages the only way to secure his attendance at the trial was to keep him in this country.^c The Court in an early case ordered a prothonotary to review his taxation where he had refused to make any allowance for the loss of time and the expenses of the captain of a vessel on his voyage to this country from Havannah, his detention here and return.^d Such expenses will certainly be allowed where the detention of the witness deprived him of the means of subsistence; provided that his evidence was material and that in order to give it the detention was necessary.^e Where the plaintiff, an engineer in the defendants' employ in India brought an action against them for wrongful dismissal and a verdict was taken by consent for £200, a quarter's salary, and £150 for his expenses in coming to England, the Court refused to review the master who on taxation had allowed the plaintiff £450 for subsistence in England while waiting for the trial which the defendants had repeatedly delayed, and £150 for expenses to enable the plaintiff to return to India.^f This decision however is not to be taken as a precedent for allowing such a sum for expenses, when the demand

^a Galloway *v.* Keyworth, 15 C.B. 229 : 23 L.J. C.P. 218.

^b Potter *v.* Rankin, L.R. 5 C.P. 518.

^c See also Evans *v.* Watson, 3 C.B. 327 : 15 L.J. C.P. 256.

^d Lonergan *v.* Royal Exchange Assurance, 7 Bing. 725 : 1 Dowl. 233; Mount *v.* Larkins, 8 Bing. 195 : 1 Dowl. 262; Berry *v.* Pratt, 1 B. & C. 276.

^e Dowdell *v.* Australian Royal Mail Steam Navigation Co., 3 E. & B. 902 : 23 L.J. Q.B. 369.

^f Calvert *v.* Scinde R. Co. 18 C.B. N.S. 306.

is for a small amount, without good grounds for doing so. In another action on a policy of insurance a captain was allowed £150 detention money, being at the rate of one guinea a day ;^a so also the Court approved the allowance of subsistence money to the captain of a ship from the service of the subpœna till the time of trial.^b

The rule does not seem to be confined to sea-faring men, provided that the detention of the witness in this country is *bond fide*.^c A witness who resides abroad, or whose avocation calls him abroad, is entitled to the expenses of being brought to this country to give evidence.^d But a foreign witness who appears to be domiciled here is not entitled to the expenses of his return here.^e

It is a question for the master whether the witness has been *bond fide* brought over to this country for the purpose of the cause, and not for any other purpose or for any other action.^f Where a witness was sent for to give evidence in an action which was discontinued, and was afterwards called as a witness in another action against a different defendant but arising out of the same transaction, the plaintiff was allowed in the second action the cost only of the witness's subsistence and detention for the purpose of the second action, but not of his voyage to this country or of his return.^g

The question how far the attendance of a witness was necessary and material is one for the master to decide.

The expenses of witnesses must be actually paid in money before the master will allow them upon taxation as between party and party.^h If therefore money due to a witness for his attendance, has been set off against the expenses of conveying him to the assize town and keeping him there, it will not be treated as payment.ⁱ The same rule would apply, although the party in whose favour the allowance is made, is suing or defending in formâ pauperis ; for now all costs ordered to be paid to such a person are, unless the Court or a judge otherwise order, to be taxed as in other cases.^j

^a Stewart v. Steele, 4 M. & G. 669 : 5 Scott, N.R. 517.

^b Temperley v. Scott, 8 Bing. 392.

^c Ansett v. Marshall, 22 L.J. Q.B. 118.

^d Marshall, 274 ; Tremain v. Faith, 1 Marsh. 563.

^e Lopez v. De Tastet, 7 Moo. 120 : 3 Br. & B. 292.

^f Tremain v. Faith, 1 Marsh. 563.

^g Tremain v. Barrett, 1 Marsh. 463 : 6 Taunt. 88.

^h Dax, 250 ; Marshall, 271 ; Lopez v. De Tastet, 7 Moo. 120 : 3 Br. & B. 292 ; Trent v. Harrison, 14 L.J. Q.B. 210 ; see ante p. 176.

ⁱ Cross v. Durrell, 29 L.J. Ex. 473.

^j Order 16, r. 31 ; see also Freeman v. Rosher, 18 L.J. Q.B. 105 : 6 D. & L. 517.

Instruc- As to instructions to sue or defend, if the taxing officer shall
tions to sue on special grounds consider the fee in either scale inadequate
or defend. he may make such further allowance as he shall in his discretion
consider reasonable (Order 65, r. 27 (3)).

Letter be- In practice only one letter demanding payment of the debt
fore action. before the writ is issued, is allowed for on taxation.^a

Where the debt is paid before the writ is issued the plain-
tiff is not entitled to the costs of his solicitor's application for
payment.^b

A distinction seems to have been drawn between a letter
before action which contains "no direction to remit" the amount
and one which does contain such a direction.^c

Expe- The costs of a demand in writing before bringing an action
diency of to recover goods or their value from a person who has in the
demand first instance lawfully obtained possession of the same, but who
before unlawfully converts or detains them, is not allowed on taxation
action. as between party and party, although it may have been expe-
dient to make the demand.^d

Letters and As to agency correspondence, in country agency causes and
corre- matters, if it be shown to the satisfaction of the taxing officer
spondence that such correspondence has been special and extensive, he is
in agency to be at liberty to make such special allowance in respect
causes. thereof as in his discretion he may think proper (Order 65, r.
27 (10)).

The usual allowance in country agency causes or matters for
letters is 6s.^e

Allowance Where no proceeding in the cause or matter is taken which
for letter carries a term fee, a charge for letters may be allowed if the
where no circumstances require it.

In addition to the above an allowance is to be made for the
necessary expenses of postages, carriage and transmission of
documents.^f

Notice of All the reasonable costs incurred by giving notices before the
action. commencement of an action when directed to be given by some
statute are allowed upon taxation as costs in the cause, but

^a *Capel v. Staines*, 2 M. & W. 850 : 5 Dowl. 770 ; *Morrison v. Summers*, 1 B. & Ad. 559 : 1 Dowl. 325 ; *Kirton v. Braithwaite*, 1 Dowl. 310.

^b *Caine v. Coulson*, 32 L.J. Ex. 97 ; *contra*, *Morrison v. Summers*, *supra*.

^c *Caine v. Coulson*, *supra* ; *Gordon v. Strange*, 1 Ex. 477 ; *Hough v. May*, 5 L.J. K.B. 186 : 4 A. & E. 954.

^d *Dax*, 141.

^e R.S.C. 1883, Append. N., Costs, tit. "Term fees."

^f As to foreign letters *see* *Lopez v. De Tastet*, 7 Moore 120 : 3 Br. & B. 292.

otherwise they are not allowed.^a The amount to be allowed is in the discretion of the master and the Court will not interfere unless the objection was taken upon taxation.

In some cases the costs of the notices are limited or fixed at a sum certain by statute; in other cases the amount allowed will depend upon the necessary length or the distances at which the same are necessarily served.^b

All necessary notices or copies thereof given during the progress of an action, are on taxation allowed to the successful party as costs in the cause.^c

Notices and services.

An allowance of 5*s.* is made for service or filing in lieu of service of any writ, summons, warrant, interrogatories, petition, order, or notice on a party who has not entered an appearance, and if not authorized to be sent by post.

But if served at a distance of more than two miles from the nearest place of business or office of the solicitor serving the same, a sum of 1*s.* is allowed for each mile beyond two miles therefrom.

Allowance when notice served at distance.

Where in consequence of the distance of the party to be served, it is proper to effect such service through an agent, (other than the London agent) 7*s.* is allowed for correspondence in addition.

Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.

Several attendances to effect service.

For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.^d

Service out of jurisdiction.

For service where an appearance has been entered on the solicitor or party 2*s.* 6*d.* is allowed; or 1*s.* 6*d.* if authorized to be served by post.

Where any writ, order and notice, or any two of them have to be served together one fee only for service is to be allowed.

Fees.

In addition to the above fees, the following allowances are also to be made; for copy for service of writs if exceeding two folios, 4*d.* per folio beyond such two.

Various allowance

Also as to summons to attend at Judges' Chambers, for each copy to serve 2*s.* and 1*s.* on the higher and lower scale respectively or 4*d.* per folio.

Also for preparing notice to produce on the trial or hearing

^a *Kent v. G. W. R. Co.*, 3 C.B. 714 : 16 L.J. C.P. 72 : 4 D. & L. 481 ; *Edwards v. G. W. R. Co.*, 12 C.B. 419.

^b *Dax*, 141, citing *Bag. Pr.* 68.

^c *Dax*, 139.

^d *See White v. Brett*, 28 L.J. Ex. 32.

of an action or notice to admit 7*s.* 6*d.* and 5*s.* on the higher and lower scale respectively ; but if special or necessarily long such allowance not exceeding per folio 1*s.* and 8*d.* on the higher and lower scale respectively as the taxing officer shall think proper ; and for each copy such allowance as the taxing officer shall think proper not exceeding 4*d.* per folio.

The scale also contains provisions as to the allowances to be made for preparing notice of motion and copy for service ; copies for service of interrogatories and of orders with necessary notices, if any, to accompany.

Except as otherwise provided, the allowances for services include copies for service.

Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together.

Where any appointment is or ought to be adjourned, service of a notice of the adjournment or next appointment is not to be allowed.

Service of
notices.

Where a plaintiff sues by a solicitor and where a defendant has appeared by solicitor, all notices must be delivered to that solicitor or his agent and not to the party himself, so long as the solicitor's authority continues. Where a party sues or defends in person the service must be made upon him, but personal service is not in general necessary.^a Notices may also be sent by post from any office of the Supreme Court ; the time at which the notice so posted would be delivered in the ordinary course is considered as the time of the service and the posting is a sufficient service (Order 67, r. 3).

Agents.

Almost all country solicitors employ agents in London to transact such part of their business as must of necessity be done in London, and all notices must in general be served by the agents, or if the expense of such notice is increased by being served in the country the master will not allow the extra expense.^b

Perusals.

As to perusals the fees are not to apply where the same solicitor is for both parties (Order 65, r. 27 (7)).

A special allowance of 13*s.* 4*d.* on the higher and 6*s.* 8*d.* on the lower scale, or 4*d.* per folio, is provided for the perusal of copy, order to add parties, notice of defendant's claim against any person, not a party to the action under Order 16, r. 49, and of defendant's defence and counter-claim served on a person not a party under Order 21, r. 13, by the solicitor of the party served therewith, and in these several cases the plaintiff's statement of claim is also to be allowed unless the solicitor has been previously allowed such perusal.

^a Archb. Pr. 176 (ed. 13).

^b Dax, 54.

A like allowance of 13s. 4d. on the higher, and 6s. 8d. on the lower scale is provided for perusal of a notice to produce on trial or hearing of action and notice to admit by the solicitor of the party served ; or if to admit facts under Order 32, r. 4, an allowance of 1s. per folio.

The master will also allow 4d. per folio for perusal of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of other special affidavits by the solicitor of the party against whom the same can be read.

Any costs occasioned by the use of any forms of writs and of indorsements thereon, other or more prolix than the forms prescribed in the Rules of Court are to be borne by the party using the same, unless the Court or a judge shall otherwise direct (Order 2, r. 2). Prolix writs and indorsements.

The statements in pleadings, whether claim, defence, counter-claim, reply or other pleading, are to be as brief as the nature of the case will admit, and the taxing officer in adjusting the costs of the action, shall at the instance of any party, or may without any request inquire into any unnecessary prolixity and order the costs occasioned by such prolixity to be borne by the party chargeable with the same (Order 19, r. 2). Pleadings to be brief.

The master however would allow on taxation the costs of setting out the precise words of a document or any part thereof where it is material to set them out, although as a general rule it is sufficient to state the effect of the contents of a document which are material (*see* r. 21). Documents set out in full sometimes allowed.

The forms given in appendices C, D and E to the Rules of Court 1883 when applicable, and where they are not applicable forms of the like character as near as may be, are to be used for all pleadings, and where such forms are applicable and sufficient, any longer forms are to be deemed prolix, and the costs occasioned by such prolixity are to be disallowed to, or borne by the party so using the same as the case may be (Order 19, r. 5). Certain forms of pleading to be used.

In adjusting the costs of the cause or matter inquiry shall at the instance of any party be made into the propriety of exhibiting interrogatories, and if it is the opinion of the taxing officer or of the Court or judge, either with or without an application for inquiry, that such interrogatories have been exhibited *inter alia*, at improper length, the costs occasioned thereby, and the answers thereto, shall be paid in any event by the party in fault (Order 31, r. 3). Interrogatories may be struck out on the ground that they are prolix (r. 7). Costs of interrogatories exhibited at improper length.

If a notice to admit or produce comprises documents which Unnecessary notices

to admit or produce. are not necessary, the costs occasioned thereby are to be borne by the party giving the notice (Order 32, r. 9).

Costs of title of affidavit. The costs occasioned by any unnecessary prolixity in the title of an affidavit are to be disallowed by the taxing officer (Order 38, r. 2).

Costs of hearsay in affidavits. The costs of every affidavit which unnecessarily sets forth matters of hearsay or argumentative matter, or copies of, or extracts from documents, are to be paid by the party filing the same (Order 38, r. 3).

General power of Court over costs unnecessarily incurred. The Court or judge may, at the hearing of any cause or matter, or upon any application or proceeding in any cause or matter in Court or at chambers, and whether the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence, notice requiring a statement of claim, notice to produce, admit, or cross-examine witnesses, account, statement, procuring discovery by interrogatories or order, applications for time, bills of costs, service of notice of motion or summons, or other proceeding, or any part thereof which is of unnecessary length, to be disallowed (Order 65, r. 27 (20)).

Judge may direct master to make inquiry. Or the Court or judge may direct the taxing officer to look into the same and to disallow the costs thereof or of such part thereof as he shall find to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties (*ibid.*).

Power of master to make inquiry. And in any case where such question shall not have been raised before and dealt with by the Court or judge it shall be the duty of the taxing officer to look into the same (and, as to evidence, although the same may be entered as read in any decree or order,) for the purpose aforesaid, and thereupon the same consequences shall ensue, as if he had been specially directed to do so; and in the Queen's Bench Division the master shall make such order as may be required to effect the object of this regulation (*ibid.*).

Prior to this regulation a direction was in one case given to the taxing master to look into certain affidavits in order to see whether they were of unnecessary length, and if so to disallow the costs occasioned thereby.*

Mode of taxation of costs where direction given. In any case in which under the last preceding regulation 20 or any other rule of Court, or by the order or direction of a Court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by

* Cracknall v. Janson, 11 Ch. D. 12.

way of deduction or set-off, or may if he shall think fit delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto, in the same manner as costs ordered to be paid may be recovered (Order 65, r. 27 (21)).

The allowances in respect of fees to the Conveyancing Council of the Court and to any accountants, merchants, engineers, actuaries, and other scientific persons, to whom any question is referred, shall be regulated by the taxing officers subject to appeal to the Court or judge, whose decision shall be final (Order 65, r. 27 (36)).

The general rule is that the costs of shorthand writers' notes of the evidence are not *prima facie* to be allowed on taxation between party and party; if there is any special reason for allowing them, application should be made at the hearing for a special direction from the Court.^a Thus the costs of the shorthand notes of the evidence given at the trial were allowed on taxation between party and party, as part of the costs of a rule for a new trial, on the ground that the verdict was against the weight of evidence; the reason being that from the quantity of evidence given at the trial, the case being one of grave importance, it was impossible for the Court to have come to a satisfactory conclusion without the aid of the shorthand notes.^b

The costs of a shorthand note of the argument will not be allowed.^c

Where shorthand notes of the evidence and proceedings in the Court below are used upon appeal, an application to be allowed upon taxation the costs of the notes, as costs of the appeal, must be made before the judgment of the Court of Appeal is entered.^d The Court of Appeal has power to allow the costs of all shorthand notes used in the appeal, whether taken for the purpose of the appeal or not.^e The costs of a short-

^a As to practice in Chancery Division see *Kirkwood v. Webster*, 9 Ch. D. 239, 242; 47 L.J. Ch. 880; *Kelly v. Byles*, 13 Ch. D. 682; 49 L.J. Ch. 181; *Lee Conservancy v. Button*, 12 Ch. D. 383; *Earl de la Warr v. Miles*, 19 Ch. D. 80; *In re Duchess of Westminster Silver Lead Ore Co.*, 10 Ch. D. 307, 312; *Orr Ewing & Co. v. Johnston & Co.*, 13 Ch. D. 434, 465; *Ashworth v. Outram*, 9 Ch. D. 483.

^b *Watson v. The G. W. R. Co.*, 6 Q.B. D. 163; 50 L.J. C.P. 302; *Bigsby v. Dickinson*, 4 Ch. D. 24; 46 L.J. Ch. 280; see also *Hill v. Metropolitan Asylum District*, 49 L.J. Q.B. 668.

^c *In re London & Birmingham R. Co.*, 6 W.R. 141.

^d *Hill v. Metropolitan Asylum District*, 49 L.J. Q.B. 668; but see *Marcus v. General St. Nav. Co.*, 35 L.T. N.S. 353.

^e *Id.*; see also *Ex parte Webster*, 52 L.J. Ch. 375.

hand note of the judgment of the Court below, is generally allowed if used during the hearing of the appeal.^a

Duty of
solicitor
when about
to incur
unusual
expenses.

It is the duty of a solicitor, who, in the course of an action, is about to incur unusual expenses—such as the costs of shorthand notes of evidence given at a reference—to point out to his client that the additional expenses so incurred, will not be allowed to him, even if successful in the action on taxation between party and party; and in default of so doing the solicitor will not be entitled to charge the costs so incurred on taxation between solicitor and client.^b In the absence of any agreement between the parties, the costs of brief copies of the transcript of shorthand writers' notes of each day's proceedings in a reference where the action is referred will not be allowed on taxation between party and party.^c

Shorthand
notes al-
lowed in
part as in-
structions
to counsel.

In an action for malicious prosecution, the master may allow for the copying into the briefs so much of the shorthand writers' notes of the evidence on the trial of the indictment as in his opinion was material and necessary for the information of counsel.^d

The charges of a shorthand writer who is employed instead of a second counsel to take notes of evidence will not be allowed.^e

In one case it was held that the plaintiff was not entitled to the costs of a shorthand writer's notes of the opening statement of the defendant's counsel.^f

Term fees.

A term fee of 15*s.* under the new rules, is allowed for every term commencing on the day the sittings in London and Middlesex of the High Court commence, and terminating on the day preceding the next such sittings, in which a proceeding in the cause or matter by or affecting the party after appearance entered, shall take place.^g Before this provision was made term fees were allowed where there was any proceeding in the cause, upon or after declaration, and before final judgment, but after final judgment they were not allowed; so also the term fee was allowed whether any proceedings were taken within the term or in the vacation, but only one term fee was allowed

^a Collyer *v.* Isaacs, 45 L.T. N.S. 567; *The Singer Manufacturing Co. v. Loog*, 52 L.J. Ch. 282, 290.

^b *In re Blyth*, 10 Q.B. D. 207; 52 L.J. Q.B. 186.

^c *Wells v. Mitcham Gas Light Co.* 4 Ex. D. 1: 48 L.J. Ex. 75, following *Croomes v. Gore*, 1 H. & N. 14: 25 L.J. Ex. 267.

^d *May v. Tarn*, 12 M. & W. 730: 13 L.J. Ex. 234.

^e *Croomes v. Gore*, *supra*.

^f *Duke of Beaufort v. Earl of Ashburnham*, 13 C.B. N.S. 598: 32 L.J. C.P. 97.

^g See R.S.C. 1883, Appendix (N), *tit.* "Term fees."

for the term and vacation following the term ; and finally where a party having the right, by his own *laches* omitted to sign final judgment when he was entitled to it, but delayed doing so until a subsequent term, he was not entitled to a term fee as of the term when final judgment was actually signed, if a term fee had already been allowed in respect of the term when he might have signed judgment.^a It is to be noticed that formerly the term fee was only allowed "*upon and after declaration*" whereas now it is to be allowed in any cause, &c., "*after appearance entered*." This allowance therefore would apply in the absence of a Statement of Claim ; the necessity for that pleading being abolished in most cases (*see* Order 20, r. 1) the reason for the old rule no longer exists.^b

As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party (Order 65, r. 27 (29)).^c

Unnecessary costs to be disallowed.

As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed (Order 65, r. 27 (30)).

Fees for work and labour.

^a Dax, 135.

^b The following extract as to Term fees is taken from the MS. book belonging to one of the old Prothonotaries of the Court of Common Pleas, already referred to *ante*, p. 216 :—"No term fee allowed between party and party where there are no other proceedings than summons and orders ; nor where only motions and they are not succeeded in ; nor before declaration, as on rule to discontinue on the writ or on rule to declare ; but on rule to plead it is allowed ; nor on taxing costs on a rule obtained only for costs ; nor where nothing after judgment but attending on a judge and taxing costs ; nor on any amendment ; nor on continuances only ; nor on notice of trial or a continuance of notice of trial or a countermand only, even between attorney and client. Allow a term fee on a rule to discontinue after declaration, though only that rule obtained in the term if the defendant has appeared and paid for the declaration. Allow a term fee on a bill against an attorney ; so where only a motion, if succeeded in and a rule made ; so also on a notice of trial ; so also on a notice of executing a writ of inquiry ; so also on a special case allowed. A term fee of 6s. 8d. allowed in Dower ; so also on a *sci. fa.*, and also on a special case. Entering, 8d."

^c *See* Bucknall *v.* Boydell, 7 Scott 171, where the Court refused to interfere with the decision of a Master who had disallowed half the costs of preparing briefs, on the ground that they had been prepared with unnecessary haste.

CHAPTER XXVI.

SET-OFF OF COSTS' AND SOLICITOR'S LIEN.

Set-off of costs notwithstanding solicitor's lien.

A SET-OFF for damages or costs between the parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought (Order 65, r. 14).

Formerly the right of a solicitor to his lien for costs was preserved only where the costs were sought to be set off in different actions *i.e.*, where there was a cross claim for costs in separate actions.^a

Set-off of interlocutory costs.

Interlocutory costs which include all costs the right to which has accrued to either party before the final conclusion of the last stage of the suit, *i.e.*, before the ultimate judgment of the Court upon the record^b—could also be set off against each other

Final costs.

and also against final costs, notwithstanding the solicitor's lien,^c provided that the payment of them at the time when adjudged was not a condition precedent to ulterior proceedings.^d

The same rule applies even where there are several defendants some or one of whom only may have been successful in the action.^e

Costs of different actions.

Under the old procedure costs of actions, might be set off against each other, although the nominal parties were different, provided that the expenses were to be defrayed out of the same fund.^f But where the judgments were in different rights, as where one party was trustee only in the one, but was interested in his own right in the other, no set off was allowed.^g So also

^a Gray, 514, and cases cited below.

^b Scott *v.* De Richebourg, 20 L.J. C.P. 263 : 11 C.B. 447, 451 ; Melville *v.* Leeson, 27 L.J. Q.B. 318 ; Levy *v.* Drew, 5 D. & L. 307.

^c Holliday *v.* Lawes, 3 Bing. N.C. 774 : 6 Dowl. 636.

^d Doe d. Hope *v.* Carter, 8 Bing. 330 : 1 M. & Sc. 516 : 1 Dowl. 269.

^e George *v.* Elston, 4 L.J. C.P. 167 : 1 Bing. N.C. 513 ; Lees *v.* Reffit, 3 Ad. & E. 707 s.c., sub. nom. Lee *v.* Kendall, 5 L.J. K.B. 19 ; Schoole *v.* Noble, 1 H. Bl. 23 ; Gregory *v.* Duke of Brunswick, 3 C.B. 481 : 16 L.J. C.P. 35.

^f Gravatt *v.* Hall, 16 L.J. Q.B. 352 ; as to set-off of costs in pauper actions *see ante* p. 44.

^g Bristowe *v.* Needham, 8 Sc. N.R. 366.

costs due from the plaintiff to A, could not be set off against costs due from B to the plaintiff, or, in other words, where the parties or proceedings were entirely different no set-off was allowed.^a It was otherwise however where, although the parties to the two actions were different, their interests were identical.^b

Costs of an action in an inferior court could be set off against costs in an action in the Superior Court ;^c so also the costs of an equity suit may be set off.^d The judgment of one superior court could also be set off against the judgment of another superior court.^e

A debt was also recently allowed to be set off against costs ; the solicitor's lien not being allowed to interfere with the rights of the parties.^f Costs which have been actually taxed were not allowed to be set off against the probable costs in another action.^g Thus where a plaintiff had been nonsuited and the costs taxed for the defendant the Court refused to allow the plaintiff to set them off against the costs of an ejectment in which he had obtained a verdict, the defendant having subsequently obtained a rule nisi to set it aside and enter a nonsuit.

Parties to an action when they appear by solicitor may effect a compromise without the intervention of their solicitors, or in other words are not bound to effect the compromise through their solicitors.^h But if a settlement be come to either after notice of the solicitor's lien or by collusion and fraud for the purpose of depriving the solicitor of his costs, the Court will interfere to prevent such an injustice.ⁱ The solicitor however must clearly

^a *Holroyd v. Breare*, 4 B. & Ald. 43, 700.

^b *O'Connor v. Murphy*, 1 H. Bl. 657.

^c *Emerson v. Lashley*, 2 H. Bl. 248.

^d *Webber v. Nicholas*, 4 Bing. 16 ; *Sandys v. Louis*, W.N. 1875, p. 249.

^e *Barker v. Braham*, 2 W. Bl. 869 ; *Brydges v. Smith*, 8 Bing. 29 ; *Bris-towe v. Needham*, *supra*.

^f *Pringle v. Gloag*, 10 Ch. D. 679 : 48 L.J. Ch. 380 ; but see *Barker v. Hemming*, 5 Q.B.D. 609, where it was held under the annulled rule 19 of Order vi. of R.S.C. (Costs) that a set-off could only be allowed in respect of the same, and not of any separate, proceeding between the same parties, and the Court refused to allow the costs of interpleader proceedings to be set off against the costs of the action ; see now *Order 65, r. 14* ; also *Thruston d. Barnes v. Crafter*, 2 W. Bl. 826.

^g *Masterman v. Malin*, 7 Bing. 435.

^h *Nelson v. Wilson*, 8 L.J. C.P. 226 : 6 Bing. 568.

ⁱ *Brunsdon v. Allard*, 2 E. & E. 19 : 28 L.J. Q.B. 306 ; *Sullivan v. Pearson*, L.R. 4 Q.B. 153 : 38 L.J. Q.B. 65 ; *Clark v. Smith*, 13 L.J. C.P. 97 : 6 M. & G. 1051 ; see also *The Hope*, 8 P. Div. 144 : 52 L.J. Adm. 63, where the law is fully stated by *Lindley L.J.* citing Archb. Pr. 142, 143 (ed. 13). *Langley v. Headland*, 34 L.J. C.P. 183 : 19 C.B. N.S. 42 ; *Gould v. Davis*, 1 Dowl. 288 ; *Welch v. Hole*, 1 Dougl. 238 ; *Ormerod v. Tate*, 1 East. 464 ; *Cowell v. Betteley*, 4 M. & Sc. 265 : 10 Bing. 432.

establish collusion between the parties to deprive him of his lien for costs in order to entitle himself to an order that the opposite party should pay him his costs.^a The same rule applies where a client suing *in forma pauperis* compromises the action with the opposite party.^b

Solicitor's
lien upon
judgment.

But the lien which a solicitor was said to have upon a judgment was merely a claim to the equitable interference of the Court to have the judgment held as a security for his debt.^c

It seems that the solicitor's lien extended only to so much as was found due to him upon taxation between solicitor and client.^d

Lien upon
deeds and
papers.

The solicitor or his personal representative in case of death has a lien for his general balance upon all deeds and papers belonging to his client which have come into his hands in the course of and with reference to his professional employment. If the documents have come into his hands as bailee and not as solicitor the lien does not attach.^e

Cessation
of lien.

The lien does not cease to attach by payment of the solicitor's charges in the particular business to which the papers relate, if he has other claims against his client as solicitor. But it ceases after satisfaction of his entire bill of costs.^f

Lien how
waived or
lost.

But the lien may be waived or lost in the same way that any other lien may: as for instance where the solicitor takes a security for his costs, which is payable at some future day, without an express reservation of his lien; although it would be revived if default be made in payment.^g

Lien of
agent.

An agent it would seem has a general lien against the country solicitor and his representatives to the same extent as the country solicitor has against his client.^h

^a Nelson *v.* Wilson, *supra* note i; The Hope, *supra*.

^b Francis *v.* Webb, 7 C.B. 731; Jones *v.* Bonner, 2 Ex. 230: 17 L.J. Ex. 343.

^c *Per Parke B.* in Barker *v.* St. Quintin, 12 M. & W. 441, 451: 13 L.J. Ex. 144; *ex parte* Games, 33 L.J. Ex. 317: 3 H. & C. 294; Slater *v.* Mayor of Sunderland, 33 L.J. Q.B. 37; Mercer *v.* Graves, L.R. 7 Q.B. 499, 503: 41 L.J. Q.B. 212, *Per Cockburn C.J.*; Simpson *v.* Lamb, 7 E. & B. 84: 20 L.J. Q.B. 121; The General Share Trust Co. *v.* Chapman, 1 C.P. D. 771: 46 L.J. C.P. 79.

^d Watson *v.* Maskell, 1 Bing. N.C. 727: 1 Scott, 658.

^e Archb. Pr. 137 (ed. 13), and cases cited.

^f Marshall, 458.

^g Archb. 139; Stevenson *v.* Blakelock, 1 M. & S. 535; Hewison *v.* Guthrie, 2 Bing. N.C. 755; Cowell *v.* Simpson, 16 Ves. 275; and *see* 33 & 34 Vic. c. 28, s. 16.

^h Archb. 160; *see also* Waller *v.* Holmes, 30 L.J. Ch. 24; *In re* Andrew, 30 L.J. Ex. 403: 7 H. & N. 87; Bray *v.* Hine, 6 Price 203; White *v.* Royal Exc. Ass. Co., 1 Bing. 20; Moody *v.* Spencer, 2 D. & Ry. 6; Ward *v.* Hepple, 15 Ves. 297.

Upon the application of the client a London solicitor was ordered, although there was no suggestion of fraud, to pay over to the client the amount of a debt which he had received as agent for a country solicitor in an action brought through him by a client of the latter, even though the country solicitor was at the time indebted to the London solicitor in an amount equal to the sum received, but had no claim against the client.^a

A solicitor is entitled, under 23 & 24 Vic. c. 127, s. 28, to a charging order upon a judgment by which any property is "recovered or preserved" through his instrumentality.

Charging
order for
property
recovered
or pre-
served.

Where the action is pending a judge at chambers has jurisdiction to make the order.^b Such an order is valid even though the plaintiff's solicitor has ceased to act as such at the time when the order was made, provided that he has not wrongly or improperly discharged himself from the position of plaintiff's solicitor.^c When the action has been tried the application for the order must be made to the judge before whom it was tried.^d

A solicitor is entitled to a charge upon real property which has been recovered through his instrumentality for the amount of his taxed costs in the action, although the estate of his client who died since action, was being administered in the Court of Chancery.^e

But a charging order, it seems, only extends to costs in the particular suit, matter, or proceeding, in which they were incurred, and not to general costs.^f

A defendant paid money into Court in an action but the plaintiff's solicitor having declined to proceed with the action, except upon terms to which the plaintiff would not accede, an order for a change of solicitors was obtained by the plaintiff. After that order was made the late solicitor obtained an order charging the money paid into Court with his costs in the action and it was held that the order was valid, for the money paid into Court was "property recovered or preserved" within the meaning of section 28 of 23 & 24 Vic. c. 127.^g

^a *Ex parte Edwards*, 8 Q.B. D. 262 : 51 L.J. Q.B. 108 ; *In re Andrew*, 7 H. & N. 87 : 30 L.J. Ex. 403.

^b *Clover v. Adams*, 6 Q.B. D. 622.

^c *Id.*

^d *Higgs v. Schrader*, 3 C.P.D. 252 : 47 L.J. C.P. 426 ; *see Catlow v. Catlow*, 2 C.P. D. 362.

^e *Ex parte Seaman*, 33 L.J. Ex. 204 : 3 H. & C. 148.

^f *Ex parte Thompson*, 3 L.T. N.S. 317.

^g *Clover v. Adams*, *supra* ; as to a charging order upon money attached by a garnishee order under 17 & 18 Vic. c. 125, s. 61, *see Birchall v. Pugin*, L.R. 10 C.P. 397 : 44 L.J. C.P. 278 ; *Shippey v. Grey*, 49 L.J. Q.B. 524 ; as to mode of serving charging order where the party is evading service *see Hunt v. Austin*, 9 Q.B. D. 598 : 51 L.J. Q.B. 455.

An order for the attachment of a debt would seem to take precedence of the general lien of a solicitor;^a but a judgment creditor who had received from a garnishee the amount of his claim before an order for payment had been made and with notice of the particular lien of the solicitor was compelled to refund to the solicitor.^b

^a *Hough v. Edwards*, 1 H. & N. 171.

^b *Eisdell v. Coningham*, 28 L.J. Ex. 213.

CHAPTER XXVII.

ACTION BY SOLICITOR ON HIS BILL OF COSTS.

NO costs, fees, or disbursements on account of or in relation to any act or proceeding done or taken by any person who acts as a solicitor without being duly qualified so to act are recoverable in any action, suit, or matter, by any person or persons whomsoever.^a Unqualified person cannot recover costs.

Where a solicitor allows an unqualified person to act in his name, no action is maintainable by him or by the unqualified person against the client for the amount of the business done.^b

The solicitor cannot bring an action to recover any fees, charges, or disbursements, for business done by him until the expiration of one calendar month^c after the delivery of the bill of costs to the party to be charged therewith.^d Delivery of bill of costs one month before action.

The bill may be either delivered to the party himself or sent by post to or left for the party at his counting-house, office of business, dwelling house,^e or last known place of abode. It must either be subscribed with the proper hand of the solicitor (or in the case of a partnership, by any of the partners either with his own name, or with the name or style of the partnership), or of the executor, administrator, or assignee of the solicitor, or be inclosed in or accompanied by a letter subscribed in like manner referring to the bill. Delivery of bill.

^a 37 & 38 Vic. c. 68, s. 12 ; and *see* 40 & 41 Vic. c. 62, s. 2 ; *Fowler v. The Monmouthshire Canal Co.*, 4 Q.B. D. 334 : 48 L.J. Q.B. 457.

^b Arch. Pr. 80 (ed. 13) ; *see also* *Hopkinson v. Smith*, 7 Moore 243 : 1 Bing. 16.

^c The day on which the bill is delivered, and that on which the action is commenced, are not reckoned in the calendar month. *Blunt v. Heslop*, 8 A. & E. 577.

^d 6 & 7 Vic. c. 73, s. 37 ; as to solicitor setting off the amount of his costs in an action on an indemnity against costs given by him to plaintiff, although no bill delivered one month before action *see* *Brown v. Tibbits*, 11 C.B. N.S. 855 : 31 L.J. C.P. 206 ; *Crampton v. Walker*, 3 E. & E. 321 : 30 L.J. Q.B. 19.

^e *See* *McGregor v. Keiley*, 3 Ex. 794 : 18 L.J. Ex. 391, as to delivery to servant at dwelling-house ; *see* *Gridley v. Austen*, 16 Q.B. 504 : 18 L.J. Q.B. 337 ; *Phipps v. Daubney*, 16 Q.B. 514 : 20 L.J. Q.B. 273 ; *Taylor v. Hodgson*, 14 L.J. Q.B. 310 ; *Roberts v. Lucas*, 11 Ex. 41 : 24 L.J. Ex. 227.

Reference to taxation. The bill upon the application within the calendar month of the party chargeable may be referred for taxation and settlement by a master without any money being brought into Court.

If the client does not apply *within* the calendar month to have the bill taxed, it may be referred on the application of the solicitor or his representatives or on the application of the client with such directions and subject to such conditions as the Court or judge making the reference shall think proper.^a

Solicitor restrained from bringing action on bill. The Court or judge making the order of reference may restrain the solicitor from bringing any action in respect of the charges, &c., contained in the bill pending the reference, upon such terms as shall be thought proper.

Special circumstances. A reference to taxation will only be ordered under special circumstances to be proved to the satisfaction of the Court or judge to whom the application for the reference is made, where the party chargeable with the bill makes the application after a verdict has been obtained, or a writ of enquiry executed, or after the expiration of twelve months after the due and proper delivery of the bill to him by the solicitor.

Taxation *ex parte*. The bill may be taxed *ex parte* by the master if either the solicitor or the person chargeable with the bill after due notice refuse or neglect to attend the reference for taxation.

Costs of the reference. The costs of the reference, where the party chargeable attends upon the taxation, are paid according to the event of the taxation, that is to say, if the bill when taxed is less by a sixth part than the bill delivered, the solicitor or his representatives are liable for the costs; but if the bill when taxed is not less by a sixth part than the bill delivered then the party chargeable with the bill, making the application to refer or attending the reference.

Deduction of one-sixth. It would seem that the real question is whether the bill delivered and ordered to be taxed, is when taxed less by one-sixth than the bill delivered, no matter how or by what means the master came to a conclusion. If it is, the solicitor is liable to pay the costs of the taxation unless the judge has made some special order as to those costs or the master has certified some special circumstances showing that he ought not to be called on to pay them.^b

Improper charges disallowed. Where a solicitor inserts in his bill an item which he ought never to have charged his client with, the master will disallow it, and the disallowance, if making the amount of the bill less by one-sixth than the bill delivered, will render the solicitor

^a As to forms see R.S.C. 1883, Appendix K, forms 41, 42, 43, and *post* Append. I.

^b Archb. Pr. 132 (ed 13).

liable for the costs of the taxation.^a So also where a deduction of more than one-sixth is taxed off a bill by reason of the solicitor having ignorantly commenced an action in a wrong form and been obliged to discontinue it he will be liable to pay the costs of taxation.^b

Every order of reference contains a direction to the master to whom the reference is made to tax the costs of the reference to be paid as above mentioned, and to certify what, upon the reference, has been found due to or from the solicitor or his representatives in respect of the bill and demand, and of the costs of the reference if payable.^c

Direction to master to tax costs of reference.

The master also may specially certify any circumstances relating to the bill or the reference and the Court or judge may thereupon make such order as may be thought right respecting the payment of the costs of taxation.

Or to certify circumstances.

Where the reference is made, when it is not authorized to be made except under special circumstances, the Court or a judge may if it shall be thought fit give any special directions relative to the costs of the reference.

Special directions

The contents of a bill which has been duly delivered sent or left according to the provisions of the Act, need not be proved in the first instance by the solicitor or his representatives, but it is sufficient to prove that a bill of fees, charges, or disbursements subscribed in the manner provided or inclosed in or accompanied by a letter subscribed as provided was delivered sent or left in the manner provided by the Act ; but nevertheless it is competent for the other party to shew that the bill so delivered, sent, or left, was not such a bill as constituted a *bond fide* compliance with the Act.^d

Proof of contents of bill.

A judge may authorize the commencement of an action for the recovery of a solicitor's fees, charges, or disbursements, against the party chargeable therewith, and may also refer the solicitor's bill and demand to be taxed, although one month has not expired from the delivery of the bill, if it is proved to his satisfaction that there is probable cause for believing that the party chargeable is about to quit England or to become a bankrupt or a liquidating or compounding debtor, or to take any other steps or do any other act which in the opinion of the judge would tend to defeat or delay the solicitor in obtaining payment.^e

Solicitor may bring action by leave.

^a *Morris v. Parkinson*, 2 C.M. & R. 178 : 3 Dowl. 374 ; *Per Parke B.*

^b *Id.*

^c *See In re Shaw*, 20 L.J. Q.B. 280.

^d The numerous provisions just referred to are taken from 6 & 7 Vic. c. 73, s. 37.

^e 38 & 39 Vic. c. 79, s. 2.

Applica-
tion by
third par-
ties to refer
bill.

An order to refer a bill of costs may be made on the application of third parties who are not "chargeable" with the bill in the sense in which that word has hitherto been used.^a

A copy of the bill of costs may be ordered by the Court or judge to be delivered to the party who makes the application for a reference upon payment of the costs of the copy.^b

Re-taxa-
tion under
special
circum-
stances.

No bill which has been previously taxed and settled is to be again referred unless under special circumstances the Court or judge to whom the application is made think fit to direct a re-taxation.^c

Payment of
bill no bar
to refer-
ence.

The payment^d of a bill does not in any case preclude the Court or judge to whom the application is made from referring such bill for taxation if the special circumstances^e of the case appear in the opinion of the Court or judge to require it to be taxed, upon such terms and conditions and subject to such directions as the Court or judge shall deem right. But the application for such reference must be made within twelve calendar months after payment.^f

Except
after lapse
of twelve
months.

Where twelve calendar months have elapsed since payment of a solicitor's bill of costs by his client, such bill although not signed by the solicitor is prohibited under 6 & 7 Vic. c. 73, s. 41, from being referred to taxation.^g But charges which, on the face of the bill appear unusual and excessive are "special circumstances" within 6 & 7 Vic. c. 73, ss. 37, 41, which entitle the client to have his solicitor's bill referred to taxation after the twelve months have expired.^h Thus charges of £52 10s. *od.*, for a journey to and attendance in London at the hearing and arguing of a rule for a new trial, and £22 15s. *od.* for attending taxation of the plaintiff's costs have been held to be such charges.

The master where a bill is referred to him for taxation has power to request assistance from other masters in taxing and settling any part of the bill.ⁱ

^a 6 & 7 Vic. c. 73, s. 38.

^b Sec. 40.

^c *Id.*

^d The payment must be actually made in money, or that which the parties have agreed to treat as money; *In re Harries*, 13 M. & W. 3: 13 L.J. Ex. 259.

^e *In re Heritage*, 3 Q.B. D. 726: 47 L.J. Q.B. 509.

^f Sec. 41.

^g *In re Sutton*, 11 Q.B. D. 377: 52 L.J. Q.B. 752.

^h *In re Robinson*, L.R. 2 Ex. 4: 37 L.J. Ex. 11; see also *Watson v. Rodwell*, 7 Ch. D. 625: 47 L.J. Ch. 418: affirmed 11 Ch. D. 150: 48 L.J. Ch. 209; *In re Whicher*, 13 M. & W. 549: 14 L.J. Ex. 78.

ⁱ Sec. 42; and see Order 65, r. 19, as to masters assisting each other generally in their duties.

The certificate or allocatur of the master, by whom a bill, which has been referred to him, has been taxed is (unless set aside or altered by order, decree, or rule of Court) final and conclusive as to the amount ; and payment of the amount certified to be due and directed to be paid may be enforced according to the course of the Court in which the reference has been made.^a Where the reference is made in the Queen's Bench Division the Court or a judge may order judgment to be entered up for the amount certified, with costs, unless the retainer is disputed, or may make such other order as the Court or judge deem proper.^b

Effect of certificate or allocatur.

A solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by him.^c The agreement must be an agreement by both parties and must be signed by both of them.^d But an agreement to charge nothing if the action is lost and to take nothing for costs out of any money which might be awarded to the client in the action need not be in writing.^e The agreement may be for payment either by a gross sum or by commission or percentage or by salary or otherwise, and either at the same or at a greater, or at a less rate as or than the rate at which the solicitor would otherwise be entitled to be remunerated.^f

Agreement for lump sum in lieu of costs.

But the amount payable under such an agreement is not to be received by the solicitor until the agreement has been examined and allowed by the master.

Amount payable not to be paid until allowed by master.

Where the master thinks the agreement is not fair and reasonable he may require the opinion of the Court or a judge to be taken thereon by motion and the amount payable under the agreement may be reduced or the agreement may be ordered to be cancelled and the costs, fees, &c., may be taxed in the ordinary way as if there had been no agreement.^g

The agreement is not to affect the amount of, or any rights or remedies for the recovery of, any costs recoverable from the client by any other person, or payable to the client by any other person ; and any such other person may require any costs

Saving of interests of third parties.

^a *i.e.*, by issuing execution thereon ; *see* also Order 42, r. 24.

^b Sec. 43.

^c 33 & 34 Vic. c. 28, s. 4.

^d *In re Lewis*, 1 Q.B. D. 724, 726 : 45 L.J. Q.B. 816.

^e *Jennings v. Johnson*, L.R. 8 C.P. 425.

^f Sec. 4, *supra*.

^g Sec. 4 ; and *see* also sec. 9.

payable or recoverable by him to or from the client to be taxed in the ordinary way unless such person has otherwise agreed. But a client who has entered into any such agreement is not entitled to recover from any other person under any order for the payment of any costs which are the subject of the agreement more than the amount payable by the client to his own solicitor under the agreement.^a

Agreement
excludes
further
claims.

The agreement excludes all further claims in respect of any services, fees, &c., which relate to the conduct and completion of the business in respect of which the agreement is made ; except however such services, fees, &c., if any, as are expressly excepted by the agreement.^b

No action
where
work done.

No action can be maintained on an agreement for remuneration in lieu of costs where the work has been done ; but an action can be brought upon the agreement where the client has refused to allow the solicitor to do the work and earn the remuneration.^c

Re-open-
ing of
agreement.

An agreement may under special circumstances, and if the application be made within twelve months after the payment thereof, be re-opened and the costs, fees, &c., may be ordered by the Court or judge to be taxed and the whole or any portion of the amount received by the solicitor to be repaid by him on such terms and conditions as may seem just.^d

Security
from client
for future
fees.

A solicitor may take security from his client for his future fees, charges, and disbursements, to be ascertained by taxation or otherwise ;^e and interest may also be allowed by the master on taxation, on moneys disbursed by the solicitor for his client, and on moneys of the client which have been improperly retained by the solicitor.^f So also the master on taxation may in determining the remuneration, if any, to be allowed to the solicitor for his services, have regard to the skill, labour, and responsibility involved.^g

Allowance
on higher
scale on
taxation
between
solicitor
and client.

Upon any reference to a master to tax a bill of costs of a solicitor for the purpose of ascertaining the amount due to such solicitor in respect thereof from the person to be charged therewith if the bill includes charges for business done in any cause or matter the master may allow the fees set forth in the column headed "higher scale" in Appendix N in respect of such cause or matter, or in respect of any particular application made, or business done therein, if on special grounds arising out of the

^a Sec. 5.

^b Sec. 6.

^c Sec. 8 ; *Rees v. Williams*, L.R. 10 Ex. 200 : 44 L.J. Ex. 116.

^d Sec. 10.

^e Sec. 16.

^f Sec. 17.

^g Sec. 18.

nature and importance, or the difficulty or urgency of the case he thinks it proper that such allowance should be made (Order 65, r. 10).

A bill of costs can only be referred to taxation if it contains taxable items; that is some charge in respect of an employment of the solicitor as such.^a It will be sufficient if the bill contains one taxable item.^b Thus a charge for preparing a warrant of attorney renders the bill taxable;^c so also a charge for drawing an affidavit of debt and getting it sworn is a taxable item.^d But a charge for serving subpoenas is not sufficient to make the bill taxable.^e

Bill must contain taxable items.

A bill of costs for work done by one solicitor as agent for another is taxable.^f It must be duly delivered in the same manner as an ordinary bill, and it may also be referred to be taxed.^g

Agent's bill taxable.

Where the client pays his bill of costs to the agent, the solicitor is not bound by such payment.^h And the client cannot as a general rule be sued by the agent for his bill of costs, for the solicitor who employs the agent is *prima facie* liable to him for his bill of costs, unless the agent has given credit to the client and not to the solicitor.ⁱ

Payment of bill by client to agent not binding on solicitor.

A party suing or defending by a solicitor is at liberty to change his solicitor in any cause or matter without an order for that purpose upon notice of such change being filed in the Central Office, or in the District Registry if the cause or matter is pending therein. But until such notice is filed and a copy thereof served, the former solicitor is to be considered the solicitor of the party (Order 7, r. 3).

Change of solicitor upon filing notice.

Prior to the passing of this rule it was decided that an order for changing a solicitor could be obtained without any provision being therein made as to the payment of his costs.^j Formerly

^a Marshall, 213; Smith v. Taylor, 7 Bing. 263.

^b Smith v. Taylor, *supra*.

^c Painter v. Linsell, 8 Scott, 453.

^d Winter v. Payne, 6 T.R. 645.

^e Presidder v. Smith, 1 W.W. & H. 51.

^f Smith v. Dimes, 4 Ex. 32; 19 L.J. Ex. 60; Becke v. Cattell, 3 M. & G. 480; 4 Sc. N.R. 246; Champ v. Stokes, 6 H. & N. 683; 30 L.J. Ex. 242.

^g Smith v. Dimes, *supra*; Billing v. Coppock, 1 Ex. 15; 16 L.J. Ex. 265.

^h Robbins v. Fennell, 11 Q.B. 248; 17 L.J. Q.B. 77.

ⁱ Robbins v. Fennell, *supra*; Hanley v. Cassam, 10 L.T. 189; Scrace v. Whittington, 2 B. & C. 11; 3 D. & R. 195.

^j Grant v. Holland, 3 C.P. D. 180; 47 L.J. C.P. 518; as to the practice with regard to obtaining an order to change the solicitor see Archb Pr. 94 (ed. 13).

the attorney could not be changed without an order of the judge^a which was drawn up upon payment of the attorney's costs unless there was some reason for the contrary and the costs were taxed as between solicitor and client. So also an agent could be changed at any time, without an order, unless his name appeared as solicitor on the record;^b but the practice will now be regulated by Order 7, r. 3.

Bill of
Costs.

The bill of costs should be so drawn that all the items appear in a taxable shape.^c It is sufficient if it gives the information as to the charges made, so as to allow the client to obtain advice, whether it should be taxed or not, *i.e.*, if it gives sufficient materials for obtaining advice as to taxation.^d But it is not necessary that the solicitor whom the client may consult as to the expediency of having the bill taxed should be able to say without further inquiry whether the charges are fair and reasonable; nor is the bill objectionable if it omits to sufficiently state one or more items.^e The name of the Court^f and of the cause in which any part of the business is charged should be stated, or the bill should be so drawn that these facts might be reasonably inferred from it.^g

A bill which contains entries of various attendances, charges, and disbursements, but with a lump sum only charged at the end, is not a sufficient signed bill on which to found an action within 6 & 7 Vic. c. 73, s. 37.^h Nor can a solicitor recover for professional services, where a lump sum is agreed upon, without having delivered a properly signed bill within the section.ⁱ

Blanks.

Blanks should not be left in the bill; and where a bill containing blanks was delivered under the statute the Court refused to make an order that the master should review his taxation by filling them up.

^a Reg. Gen. H.T. 1853, r.4.

^b Archb. Pr. 159.

^c Philby v. Hazle, 8 C.B. N.S. 647 : 29 L.J. C.P. 370.

^d Haigh v. Ousey, 7 E. & B. 578 : 26 L.J. Q.B. 17; Keene v. Ward, 13 Q.B. 515 : 19 L.J. Q.B. 46; but see Pigot v. Cadman, 1 H. & N. 837 : 26 L.J. Ex. 134.

^e Haigh v. Ousey, *supra*; Waller v. Lacey, 1 Sc. N.R. 186 : 8 Dowl. 563; Pilgrim v. Hirschfeld, 9 L.T. N.S. 288 : 12 W.R. 51.

^f Englehart v. Moore, 15 M. & W. 548 : 15 L.J. Ex. 312; Cooke v. Gildard, 1 E. & B. 26 : 22 L.J. Q.B. 90.

^g Sargent v. Gannon, 7 C.B. 742 : 18 L.J. C.P. 220; Martindale v. Falkner, 2 C.B. 706 : 15 L.J. C.P. 91; Ivimey v. Marks, 16 M. & W. 843 : 17 L.J. Ex. 165.

^h Wilkinson v. Smart, 24 W.R. 42; see also Philby v. Hazle, *supra*; Scarth v. Rutland, L.R. 1 C.P. 642.

ⁱ Wilkinson v. Smart, 33 L.T. N.S. 573; Eyre v. Shelley, 8 M. & W. 254 : 10 L.J. Ex. 295.

Action by Solicitor on his Bill of Costs. 243

Every bill of costs left for taxation is to be indorsed with the name and address of the solicitor by whom it is so left, and also ^{Indorse-}ment by the name and address of the solicitor (if any) for whom he is ^{solicitor.} agent, including any solicitor who is entitled or intended to participate in the costs to be so taxed (Order 65, r. 27 (58)).

CHAPTER XXVIII.

COSTS OF INTERPLEADER AND ATTACHMENT OF DEBTS.

Costs of
interplea-
der.

THE Court or a judge may in or for the purposes of any interpleader proceedings make all such orders as to costs and all other matters as may be just and reasonable (Order 57, r. 15).^a

The Court or a judge may with the consent of both claimants, or on the request of any claimant, if, having regard to the value of the subject matter in dispute it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner, and *on such terms as may be just* (r. 8).

As to the mode in which relief by way of interpleader may be granted see Order 57.

Costs re-
served until
proceed-
ings deter-
mined.

The costs of interpleader proceedings are in practice often reserved until the proceedings have been finally determined; and as between the parties thereto depend in general upon the result of the issue.^b But it is to be observed that the Court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for (r. 13).

The question whether a sheriff or party interpleading is entitled to costs, and if so, at what point of time his right to them commences, was recently considered by *Field J.* at chambers, and the following rules as to the practice were laid down.^c

Sheriff's
costs.

Where an order is made on the application of a sheriff, he is entitled to his costs from the period at which he has been called into the interpleading action—that is to say, he is entitled as against an unsuccessful claimant to costs and possession money,

^a See *Cotter v. Bank of England*, 2 Dowl. 728; *Duear v. Mackintosh*, 2 Dowl. 730; *Parker v. Linnett*, 2 Dowl. 564; *Attenborough v. St. Katherine Docks Co.*, 3 C.P. D. 450, 466.

^b See Archb. Pr. 1122 (ed. 13); *Hood v. Bradbury*, 6 M. & G. 981; *Melville v. Smark*, 3 M. & G. 57; *Cusel v. Pariente*, 7 M. & G. 527.

^c *Searle & Co. v. Matthews, Fox & Co., claimants.* The Law Journal, Nov. 17, 1883, p. 625; W.N. 1883, p. 176.

from the time of the notice of claim or from the time of sale whichever would be first.

Where a sheriff is ordered to withdraw, he is entitled to costs as against the execution creditor from the time at which the latter authorized the carrying on of the interpleader proceedings—that is, generally, from the return of the interpleader summons.

In cases where the interpleader summons is taken out by the defendant in an action, he is entitled, on bringing into Court the amount claimed to deduct from it the amount of his taxed costs up to that period, the question of the liability of the respective parties for those costs being reserved. Party's costs.

The rules just referred to are general only ; and if in any particular case the sheriff or party interpleading has unnecessarily caused any portion of the costs, he will not be entitled to recover, but may be called upon to pay costs.

In a recent case before *Field J.* at chambers, where a claim was made and the sheriff served an interpleader summons, but upon the return of the summons the execution creditor withdrew, not having given any previous authority to the sheriff to contest the claim, it was held that the sheriff was not entitled to any costs. The ground of the decision there was that the law imposed upon the sheriff the duty of executing the writ, and relieved him from the consequences of taking another person's goods by allowing him to take out a summons to interplead, but that the execution creditor if he did not resist the claim made to the goods ought not to be liable for any costs.^a

The provisions of Orders 31 and 36, which relate to discovery and inspection and trial respectively, apply, with the necessary modifications to an interpleader issue ; and the Court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for (Order 57, r. 13).

Formerly where a claimant did not appear and persist in his claim, the order barring his claim was made without costs, and the plaintiff and defendant each paid his own costs.^b Non-appearance of claimant

Where the sheriff delayed to interplead in consequence of negotiations between the parties, and the execution creditor Delay of sheriff to interplead.

^a C. v. D. : The Law Journal (Dec. 8, 1883), at p. 665 : Weekly Notes, 1883, at p. 207.

^b Lambert v. Cooper, 5 Dowl. 547 ; Jones v. Lewis, 8 M. & W. 264 : 5 Jur. 873 ; Grazebrook v. Pickford, 10 M. & W. 279 : 12 L.J. Ex. 171 ; Murdoch v. Taylor, 6 Bing. N.C. 293 : 8 Scott, 604 ; Ford v. Dilly. 5 B. & Ad. 885 ; but see Bowdler v. Smith, 1 Dowl. 417 ; as to practice see Order 57, r. 10.

Costs of frivolous application. afterwards abandoned his claim, the Court refused to make the latter pay costs.^a In some cases where the sheriff neglects to apply to interplead until too late, the Court would order him to pay the costs of both parties.^b So also if the application of the sheriff be a frivolous one, he would be ordered to pay the costs occasioned thereby ;^c as, for instance, if he brings parties before the Court in consequence of a claim which is clearly bad in point of law ; for it is his duty to inquire into the nature of the claims set up.^d

Where neither the plaintiff nor claimant appears, the sheriff is discharged from actions by either of them and is permitted to levy his poundage and expenses and to abandon the remainder of the levy.^e

Sheriff's costs where claim abandoned. Where a claimant abandoned his claim after an issue had been directed, the sheriff was held to be entitled to his costs from the time of directing the issue, including the costs of the application for the costs so incurred.^f

Apportionment of costs. The principle upon which the costs of an interpleader issue are to be taxed, where each party has been partially successful, is that each party is entitled to the costs in respect of the matter as to which he has succeeded. In such a case no general costs of the cause would, as a rule, be allowed, but the costs would be taxed without reference to the fact which was plaintiff and which defendant.^g

Execution. Any order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect (*see* Order 42, r. 24).

This is effected by suing out execution upon the order. An order for costs made in interpleader proceedings can, therefore, under this rule, be enforced by issuing execution thereon.^h

Costs of attachment. The costs of any application for an attachment of debts, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a judge (Order 45, r. 9).ⁱ

^a *Dixon v. Ensell*, 2 Dowl. 621.

^b *Beale v. Overton*, 5 Dowl. 599.

^c *In re Sheriff of Oxfordshire*, 6 Dowl. 136.

^d *Bishop v. Hinxman*, 2 Dowl. 166.

^e *Eveleigh v. Salisbury*, 5 Dowl. 369 : 3 Bing. N.C. 298 : 3 Scott, 674.

^f *Scales v. Sargeson*, 4 Dowl. 231 ; *Dabbs v. Humfries*, 3 Dowl. 377.

^g *Clifton v. Davis*, 6 E. & B. 392 : 25 L.J. Q.B. 344 ; *Lewis v. Holding*, 2 M. & G. 875 ; *Carr v. Edwards*, 8 Dowl. 29 ; but *see Staley v. Bedwell*, 10 Ad. & E. 145 ; *Swaine v. Spencer*, 9 Dowl. 347.

^h As to former practice *see* 1 & 2 Will. iv. c. 58, s. 6, repealed by 46 & 47 Vic. c. 49, sched. ; as to security for costs *see ante* p. 85.

ⁱ *See* R.S.C. 1883, Append. K, forms 39 and 40 for form of garnishee order nisi and absolute. These forms do not contain any express provisions as to costs ; *Wintle v. Williams*, 3 H. & N. 288 : 27 L.J. Ex. 311.

The Court or a judge may upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solicitor stating that judgment has been recovered or the order made, and that it is still unsatisfied and to what amount, and that any other person is indebted to such debtor and is within the jurisdiction, order that all debts owing or accruing^a from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a judge or an officer of the Court, as such Court or judge shall appoint, to show cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order (Order 45, r. 1).

Order to attach debts due to judgment debtor.

It is to be noticed that rule 1 now extends attachment to orders as well as judgments; formerly a person could not obtain a garnishee order in cases where he had obtained an order for costs only.^b

Service of an order that debts, due or accruing to a debtor liable under a judgment or order, shall be attached, or notice thereof to the garnishee, in such manner as the Court or judge shall direct, shall bind such debts in his hands (r. 2).

Service of order bind debts.

If the garnishee does not forthwith pay into Court the amount due from him to the debtor, liable under a judgment or order, or an amount equal to the judgment or order, and does not dispute the debt due or claimed to be due from him to such debtor, or if he does not appear upon summons, then the Court or judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment or order (r. 3).

Issue of execution.

An order will be made by the judge for execution to issue

^a Webb *v.* Stenton, 52 L.J. Q.B. 584; 11 Q.B. D. 518; Jones *v.* Thompson, E.B. & E. 63; 27 L.J. Q.B. 234; Tapp *v.* Jones, L.R. 10 Q.B. 591; 44 L.J. Q.B. 127; Hall *v.* Pritchett, 3 Q.B. D. 215; 47 L.J. Q.B. 14; *In re* Cowan's Estate, 14 Ch. D. 638; 49 L.J. Ch. 402; Nash *v.* Pease, 47 L.J. Q.B. 766; as to what debts are or are not attachable see Archb. Pr. 629, 630 (ed. 13); Day's C.L.P. Act, 1854, p. 315 (ed. 4).

^b For former practice see *Sunderland Local Marine Board v. Frankland*, L.R. 8 Q.B. 18; 42 L.J. Q.B. 13; *Best v. Pembroke*, L.R. 8 Q.B. 363; 42 L.J. Q.B. 212; *Cremetti v. Crom*, 4 Q.B. D. 225; 48 L.J. Q.B. 337.

for the whole amount due from the garnishee to the judgment debtor.^a

Liability
disputed.

If the garnishee disputes his liability, the Court or judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined (Order 45, r. 4).^b

Lien of
third
person.

Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or a judge may order such third person to appear, and state the nature and particulars of his claim upon such debt (r. 5).

Claim of
third per-
son may be
barred.

After hearing the allegations of any third person under such order, as in rule 5 mentioned, and of any other person whom by the same or any subsequent order the Court or a judge may order to appear, or in case of such third person not appearing when ordered, the Court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person, or make such other order as such Court or judge shall think fit, upon such terms, in all cases, with respect to the lien or charge, if any, of such third person, and to costs, as the Court or judge shall think just and reasonable (r. 6).

Discharge
of garni-
shee.

Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid is a valid discharge to him as against the debtor, liable under a judgment or order, to the amount paid or levied, although such proceeding may be set aside or the judgment or order reversed (r. 7).

Debt at-
tachment
book to be
kept.

A debt attachment book is to be kept by the proper officer in which entries of the attachment and proceedings thereon are to be made; and copies of the entries may be taken by any person on application to the proper officer (r. 8).

Appeal
from order.

An appeal lies to the Divisional Court and thence to the Court of Appeal from an order attaching a debt.^c

^a *Sampson v. Seaton & Beer Railway Co.*, L.R. 10 Q.B. 28 : 44 L.J. Q.B. 155.

^b As to costs of proceedings by writ formerly *see Johnson v. Diamond*, 11 Ex. 431 : 25 L.J. Ex. 40 ; *Wintle v. Williams*, 3 H. & N. 288 : 27 L.J. Ex. 311.

^c *See Webb v. Stenton*, 52 L.J. Q.B. 584 : 11 Q.B. D. 518 ; *Wise v. Birkenshaw*, 29 L.J. Ex. 240 ; *Seymour v. Corporation of Brecon*, 29 L.J. Ex. 243, where such appeals were entertained.

CHAPTER XXIX.

EXECUTION.

EVERY order of the Court or a judge in any cause or matter, may be enforced against all persons bound thereby in the same manner as a judgment to the same effect (Order 42, r. 24). Enforcement of order by execution.

As a general rule the costs of an action are awarded to the successful party in the judgment itself. These costs, and also costs payable by an order of the Court or a judge or by a rule of Court, are recoverable by execution. But no subpoena for the payment of costs can now be issued (Order 43, r. 7).

Costs payable under a judge's order could also, prior to Order 42, r. 24, be recovered by action or counterclaim.^a

The following rules of Order 42 deal with the mode in which a party may by execution levy the amount of the judgment or order which makes costs payable to him.

Thus, every person to whom any sum of money or any costs shall be payable under a judgment or order shall, so soon as the money or costs shall be payable, be entitled to sue out one or more writ or writs of *fieri facias* or one or more writ or writs of *elegit* to enforce payment thereof, subject nevertheless as follows : When *fi. fa* or *elegit* may issue.

- (a.) If the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period :
- (b.) The Court or a judge may at, or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit (r. 17).

Upon any judgment or order for the recovery or payment of a sum of money and costs, there may be, at the election of the party entitled thereto, either one writ or separate writs of execution for the recovery of the sum and for the recovery of the costs, but a second writ shall only be for costs and shall be issued not less than eight days after the first writ (r. 18). Separate writs for money and costs.

^a Philpott v. Lehain, 35 L.T. N.S. 855.

In other cases.

A party who has obtained judgment or an order, not being a judgment for payment of money or costs, or for the recovery of land, may issue execution in fourteen days, unless the Court or a judge shall order execution to issue at an earlier or later date with or without terms (r. 19).

Execution within and after six years.

As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order (r. 22).

In the following cases, viz. :—

- (a.) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution ;
- (b.) Where a husband is entitled or liable to execution upon a judgment or order for or against a wife ;
- (c.) Where a party is entitled to execution upon a judgment of assets *in futuro* ;
- (d.) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company ;

the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just (r. 23).

Costs.

Poundage, fees, and expenses.

In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered (r. 15).

The term "expenses of execution" is not confined to the costs of the writ only, it also includes the expenses of levying, keeping possession, selling, etc.^a A sheriff is only entitled to poundage where there has been a levy. If therefore the money is paid or tendered to him without any levy he will not be entitled to poundage.^b

Poundage.

Poundage is the amount which a sheriff is entitled by statute

^a Archb. Pr. 543.

^b Archb. Pr. 542, and cases there cited.

to levy as a recompense for executing writs of *feri facias* and *capias ad satisfaciendum*. Thus it is provided by the statute of 29 Eliz. c. 4, that a sheriff under an execution is entitled to 1s. for every 20s. levied if the sum does not exceed £100, and 6d. for every 20s. above that sum.

A table of fees to be taken by sheriffs, undersheriffs, bailiffs, Sheriff's &c., was settled by the judges under 7 Will. 4, and 1 Vic. c. 55.^a fees. Where any duty is performed by the sheriff's officer which is not provided for by the table of fees the master upon special application may allow such sum as in his discretion he may think adequate. This statute does not affect the provisions of 29 Eliz. c. 4, so that a sheriff levies poundage under the latter Act, and the fees under the former.^b

Inasmuch as the sheriff is only entitled to his poundage and the amount of fees given by statute, he cannot recover anything for any extra trouble and expense to which he may have been put in making the levy.^c Extra expenses not allowed to sheriff.

A sheriff is entitled to poundage on the sum received under the execution only, and not on the amount claimed or seized.^d

A sheriff, even where the execution is set aside, is entitled to poundage if he has levied the amount marked on the writ and has paid it over to the plaintiff;^e so also where the parties come to an arrangement before the sale takes place.^f Poundage on levy.

Where a sheriff's officer in the execution of a warrant of *fi. fa.* went with another man to the debtor's house, shewed him the warrant, demanded payment, and told him that in default of payment the man must remain in possession and further proceedings would be taken, whereupon the debtor paid the sum demanded in the warrant including poundage and officer's fee, it was held that there had been in substance a levy, and that the sheriff was entitled to poundage and fee although there had been no sale.^g But at all events, a discharged fee may be lawfully and properly taken.^h

A penalty of £40 to be forfeited to the Crown is imposed by 29 Eliz. c. 4, s. 1, upon any sheriff, undersheriff, bailiff, &c., who Penalty for extortion by sheriff or his officer.

^a See *post* Appendix, tit. "Table of Sheriff's fees."

^b *Davies v. Griffiths*, 7 Dowl. 204.

^c *Davies v. Edmonds*, 12 M. & W. 31; 13 L.J. Ex. 1; *Slater v. Haines*, 7 M. & W. 413.

^d *Dax*, 145; *Rex v. Robinson*, 4 Dowl. 447; 2 C.M. & R. 334.

^e *Rawstone v. Wilkinston*, 4 M. & S. 256.

^f *Alchin v. Wells*, 5 T.R. 470.

^g *Bissicks v. Bath Coll. Co.*, 2 C.P. D. 459, not following *Nash v. Dickenson*, L.R. 2 C.P. 252; *Roe v. Hammond*, 2 C.P. D. 300; *Mortimore v. Cragg*, 47 L.J. C.P. 348; *contra Miles v. Harris*, 12 C.B. N.S. 551; 31 L.J. C.P. 361.

^h *Masters v. Lowther*, 11 C.B. 948, 953; 21 L.J. C.P. 130, 132.

may be guilty of extortion, and the party aggrieved may bring an action to recover treble damages and treble costs ;^a so also the sheriff where his officer is guilty of extortion may be called upon to shew cause why the excess should not be refunded, and the officer to shew cause why an attachment should not issue against him.^b

Non-liability of solicitor to sheriff for fees.

The solicitor of a judgment creditor who, in the course of his duty lodges a writ of *fi. fa.* at the office of the sheriff with a request for execution, but giving no instructions as to the selection of any particular bailiff, is not liable to the bailiff by whom the writ is executed for the fees due to him for executing the writ.^c The law, apart from a contract to pay them express or implied, casts no such liability upon the solicitor. No such contract can be implied from the mere fact that the solicitor in the ordinary course of his duty lodges the writ at the sheriff's office for execution.

A request by a solicitor that a particular bailiff might be employed to execute the writ is evidence of a contract by him to pay that bailiff's fees and possession money.^d In such a case the solicitor does something more than merely deliver the writ for execution to the bailiff.

It also seems that the opinions expressed by *Bramwell B.* and *Martin B.* in *Newman v. Merriman*^e to the effect that a sheriff's officer cannot recover his fees from a solicitor when the execution has proved practically abortive and unfruitful ought not to be extended to a different case to the one then before the Court, viz.: where the goods seized were not the property of the judgment debtor.^f

Indorsement to sheriff.

Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff,^g or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon, if

^a *Berton v. Lawrence*, 5 Ex. 816; see 5 & 6 Vic. c. 97, ss. 1 & 2, as to the substitution of usual costs between party and party, in lieu of double and treble costs.

^b *Blake v. Newborn*, 17 L.J. Q.B. 216.

^c *Royle v. Busby*, 6 Q.B. D. 171 : 50 L.J. Q.B. 196, following *Maybery v. Mansfield*, 9 Q.B. 754 : 16 L.J. Q.B. 102, but dissenting from *Brewer v. Jones*, 10 Ex. 655 : 24 L.J. Ex. 143; see also *Seal v. Hudson*, 4 D. & L. 760 : 11 Jur. 610; *Maile v. Mann*, 2 Ex. 608 : 6 D. & L. 42.

^d *Foster v. Blakelock*, 5 B. & C. 328; *Walbank v. Quarterman*, 3 C.B. 94.

^e 26 L.T. N.S. 39 : 20 W.R. 369; *Cole v. Terry*, 5 L.T. N.S. 347.

^f *Per Lord Selborne LC.* in *Royle v. Busby*, 6 Q.B. D. at p. 175 : 50 L.J. Q.B. 196.

^g See as to former practice, *Curtis v. Mayne*, 2 Dowl. N.S. 37.

sought to be recovered, at the rate of £4 per cent. per annum from the time when the judgment or order was entered or made; provided that in cases where there is an agreement between the parties that more than £4 per cent. interest shall be secured by the judgment or order, then the indorsement may be accordingly to levy the amount of interest so agreed (Order 42, r. 16).

Writs of *feri facias* and of *elegit* have the same force and effect as the like writs have heretofore had and are executed in the same manner in which the like writs have heretofore been executed (Order 43, r. 1).^a

Effect of
fi. fa. and
elegit.

The sheriff is entitled by 3 Geo. I. c. 15, s. 16, in executing a writ of *elegit* to 1s. in the pound upon the yearly value of the land if such value does not exceed £100, and to 6d. in the pound if the yearly value exceeds £100. If goods are taken under an *elegit* the sheriff is entitled to the same poundage as upon a levy under a *feri facias*; but the statute of 3 Geo. I. c. 15 restrains the sheriff from taking any greater fee for executing a writ of *elegit* by extent of real estates than 1s. for every twenty shillings of the yearly value of the lands actually extended under the writ;^b and no more.^c

Sheriff's
fees on
writ of
elegit.

Under the provisions of 1 & 2 Vic. c. 110, s. 11, a sheriff may extend the whole of the debtor's lands instead of a moiety as heretofore.

Under the Bankruptcy Act, 1883 (46 & 47 Vic. c. 52) s. 146, a sheriff shall not under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods.

The sheriff's charges for executing a writ of *elegit* are fixed under the provisions of 7 Will. 4 & 1 Vic. c. 55.^d

The party entitled to execution of a writ of *elegit* may levy the poundage, fees, and expenses of execution over and above the sum recovered (Order 42, r. 15).

Poundage
fees.

Where it appears upon the return of any writ of *feri facias* that the sheriff or other officer has by virtue of such writ seized but not sold any goods of the person directed to pay a sum of money or costs, the person to whom such sum of money or costs is payable shall immediately after such writ with such return shall have been filed as of record, be at liberty to sue out a writ of *venditioni exponas* (Order 43, r. 2).

Writ of
venditioni
exponas.

Where it appears upon the return of any writ of *feri facias* or any writ of *elegit* that the person against whom such writ

Fi. fa. de
bonis eccle-
siasticis.

^a As to the practice see Archb. Pr. 550 (ed. 13); Daniell's Chancery Pr. 848, 864.

^b Dax, 143.

^c Nash v. Allen, 12 L.J. Q.B. 298; Carter v. Hughes, 2 H. & W. 714.

^d For table of fees see *post* Appendix, tit. "Table of Sheriff's Fees."

was so issued is a beneficed clerk and has no goods or chattels nor any lay fee in the bailiwick of the sheriff to whom such writ was directed, the person to whom the sum of money or costs mentioned in such writ is or are payable shall immediately after such writ with such return shall have been filed as of record, be at liberty to sue out one or more writs of *feri facias de bonis ecclesiasticis*, or one or more writs of sequestration (r. 3).

Such writs as in the last preceding rule mentioned, when sealed, shall be delivered to the Bishop to be executed by him, and such writs when returned by the Bishop, shall be delivered to the parties or solicitors by whom respectively they were sued out and shall thereupon be filed as of record in the Central office; and for the execution of such writs the Bishop or his officers shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority (r. 4).

Writs in aid.

Writs of *venditioni exponas*, *distringas nuper vice comitem*, *feri facias de bonis ecclesiasticis* and all other writs in aid of a writ of *feri facias* or of *elegit* may be issued and executed in the same cases and in the same manner as heretofore (r. 5).

Writ of sequestration.

Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof be entitled without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery had before the commencement of the Principal Act and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the Court of Chancery (r. 6).^a

No subpoena for costs.

But no subpoena for the payment of costs, and unless by leave of the Court or a judge, no sequestration to enforce such payment shall be issued (r. 7).

Discovery in aid of execution.

When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court or a judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, be orally examined, as to, whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or

^a As to the practice *see* Daniell's Chancery Pr. 908 (ed. 6).

order, before a judge or an officer of the Court as the Court or judge shall appoint; and the Court or judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents (Order 42, r. 32).

In case of any judgment or order other than for the recovery or payment of money if any difficulty shall arise in or about the execution or enforcement thereof, any party interested may apply to the Court or a judge, and the Court or judge may make such order thereon for the attendance and examination of any party or otherwise as may be just (r. 33).

The costs of any application under the last two preceding rules or either of them, and of any proceedings arising from or incidental thereto, shall be in the discretion of the Court or a judge, or in the discretion of such officer as in rule 32 mentioned, if the Court or a judge shall so direct (r. 34).

Under the old practice a judgment creditor who issued execution for the amount of the debt and satisfied the judgment without taxing his costs was held to have waived his right to them, and could not afterwards recover them; but in a recent case before *Field J.* at Chambers it has been decided that a party is entitled, under the provisions of Order 42, r. 18, to have separate executions—one for the debt and subsequently another for the costs.* It may, however, be that a creditor who after having taxed his costs sues out two executions, where one would be sufficient, would not be entitled to recover as against the debtor, the costs so unnecessarily incurred.

Separate
executions
for debt
and costs.

* *Harris v. Jewell*. The Law Journal, Dec. 15, 1883, p. 683; W. N. 1883, p. 216.

CHAPTER XXX.

ACTION TO RECOVER COSTS AS DAMAGES.

Costs recoverable as damages.

IN addition to the various remedies for the recovery of costs, as for instance by execution, attachment, and in the case of a solicitor, by an action for the recovery of his bill of costs, a plaintiff is sometimes entitled to bring an action to recover as damages the costs and expenses to which he has been put in legal proceedings by reason of the wrongful act or breach of contract of the defendant.

What costs recoverable.

The only amount which the plaintiff is entitled to recover as damages if costs are given in the first action is the sum taxed according to the ordinary rules of the Court;^a but if costs are expressly withheld in the particular case, the plaintiff in the second action would not be entitled to recover any costs as damages in that action.^b

"The reason for the rule," it is said in *Mayne on Damages*^c "appears to be that costs are in theory supposed to be a compensation for expenses justly and properly incurred in the action. Therefore any costs incurred beyond those allowed must be assumed to have been unnecessary; and where costs are refused it must be assumed that they were refused on account of some fault in the party to whom they were denied; and in either case they would be too remote to be a ground of damage against a third person."

Extra costs.

Extra costs, that is to say costs *ultra* the costs awarded by the Court in the original action, cannot be recovered.^d

It was said by *Brett MR.* in a recent case^e that the theory as to the payment of extra costs is that they are costs which are not necessary for the purposes of the party who

^a *Cotterell v. Jones*, 11 C.B. N.S. 713 : 21 L.J. C.P. 2 ; *Sinclair v. Eldred*, 4 Taunt. 7 ; *Grace v. Morgan*, 2 Bing N.C. 534 ; *Gould v. Barratt*, 2 M. & Rob. 171.

^b *Malden v. Fyson*, 11 Q.B. 292 : 17 L.J. Q.B. 85.

^c At p. 69 (ed. 3).

^d *Cotterell v. Jones*, 11 C.B. N.S. 713 : 21 L.J. C.P. 2 ; *Hodges v. Earl of Lichfield*, 1 Bing. N.C. 492.

^e *Quartz Hill Gold Mining Co., v. Eyre*, 52 L.J. Q.B. 488, at p. 490.

has incurred them. When costs are taxed as between party and party, the losing party is bound to pay the costs as between party and party, leaving the other party to pay the remaining costs. The costs therefore which a losing party is bound to pay are all the costs necessarily incurred by the other party in the litigation. It is only just that the losing party should pay the costs necessary to support the litigation, but not the extra costs caused by the litigation of the other party. Such extra costs are not costs necessary to the litigation, although it may be reasonable that they should be paid by the client to the solicitor. Therefore, where the litigation is false and malicious and without reasonable and probable cause, it is immaterial whether extra costs were incurred or not; for these costs would not be caused by the litigation and would not be any damage for which an action will lie.^a

But in an action for malicious prosecution the plaintiff is entitled to recover, in addition to damages for the injury to his character, the costs incurred in defending himself against the charge. But it must be left to the jury to deduct all such costs as were not necessarily incurred.^b

Upon a contract of indemnity, a party is entitled to recover the amount of costs paid by him to his solicitor.^c

Under the present practice, a defendant who claimed to be indemnified would apply to join as third party under Order 16 the person by whom he claimed to be indemnified.

But the costs which the party is entitled to recover are those costs only which have been fairly, reasonably, and necessarily incurred.^d Thus he would not be entitled to recover the costs of defending a hopeless action simply because he had been indemnified; for he has no right to put the person who has indemnified him to unnecessary and useless expense;^e nor to defend an action in which there was no real defence.^f

^a Quartz Hill Mining Co. v. Eyre, *supra*.

^b Rowlands v. Samuel, 11 Q.B. 39 : 17 L.J. Q.B. 65.

^c Smith v. Compton, 3 B. & Ad. 407 ; Duffield v. Scott, 3 T.R. 374 ; Penley v. Watts, 7 M. & W. 601 : 10 L.J. Ex. 229 ; Hornby v. Cardwell, 8 Q.B. D. 329 : 51 L.J. Q.B. 89 ; Howard v. Lovegrove, L.R. 6 Ex. 43 : 40 L.J. Ex. 13.

^d Smith v. Howell, 20 L.J. Ex. 377, 380 : 6 Ex. 730 ; Walker v. Hatton, 10 M. & W. 249 : 11 L.J. Ex. 361.

^e Walker v. Hatton, *supra* ; Dawson v. Morgan, 9 B. & C. 618 ; Short v. Kalloway, 11 A. & E. 28 ; Ibbett v. De la Salle, 30 L.J. Ex. 44 : 6 H. & N. 233.

^f Short v. Kalloway, *supra* ; Ronneberg v. The Falkland Islands Co., 17 C.B. N.S. 1 : 34 L.J. C.P. 34 ; Tindall v. Bell, 11 M. & W. 228, 232 ; Godwin v. Francis, L.R. 5 C.P. 295 : 39 L.J. C.P. 121 ; Pierce v. Williams, 23 L.J. Ex. 322 ; Pow v. Davis, 1 B. & S. 220 : 30 L.J. Q.B. 257.

If the defendant in the second action expressly gave his consent to the plaintiff to defend the first action, he will be liable to the costs of that action.^a This consent may also be inferred, as for instance, where the defendant did not prohibit the plaintiff defending the action after he had received notice that it had been brought.^b

Costs of proceedings incurred by wife through conduct of husband.

Unless the necessity for proceedings by a wife against a husband for a judicial separation be made out in point of fact, the husband cannot be made liable for costs incurred by the wife, although the solicitor for the wife may have had reasonable grounds for supposing, upon the statement of the wife that proceedings ought to be taken.^c Where a wife whose husband had deserted her without cause and left her without means, instituted by the advice of her solicitors, a suit for the restitution of conjugal rights and obtained a decree for alimony *pendente lite*, it was held that the legal expenses so incurred were necessities for which she had an implied authority to pledge his credit during his lifetime and for which after his death his executors were therefore liable.^d

Investigation of bad title.

A purchaser may recover as damages in an action against a vendor for breach of contract in not making a good title to an estate, the expenses of investigating the title, even though he has not at the time when the action is brought paid the solicitor's bill; for the liability to pay is a sufficient ground of damage.^e

Joint-surety.

A plaintiff who had been joint surety with the defendant, is entitled to recover a moiety of the costs of execution of an action brought against him upon the security.^f

Warranty of authority by agent.

One who professes to contract as agent for another must, unless there be something in the transaction to rebut the implication, be taken to warrant that the authority which he professes to have does in fact exist. And if he has no such authority he is liable to make good to the person who enters into the contract upon the faith of his being duly authorized, all the damage which is the natural and proximate cause of the false assertion of authority.^g Such damages would include the

^a Blyth v. Smith, 5 M. & G. 405 : 12 L.J. C.P. 203 ; Williams v. Burrell, 1 C.B. 402 : 14 L.J. C.P. 98.

^b Rolph v. Crouch L.R. 3 Ex. 44 : 37 L.J. Ex. 8.

^c Taylor v. Hailstone, 52 L.J. Q.B. 101.

^d Wilson v. Ford, L.R. 3 Ex. 63 : 37 L.J. Ex. 60.

^e Richardson v. Chasen, 10 Q.B. 756 : 16 L.J. Q.B. 341.

^f Kemp v. Finden, 12 M. & W. 421 : 13 L.J. Ex. 137.

^g Mayne on Damages, p. 77 (ed. 3), citing Collen v. Wright, 7 E. & B. 30 : 26 L.J. Q.B. 147 ; Richardson v. Williamson, L.R. 6 Q.B. 276 : 40 L.J. Q.B. 145 ; Weeks v. Propert, L.R. 8 C.P. 427 : 42 L.J. C.P. 129 ; Randell v. Trimen, 18 C.B. 786 : 25 L.J. C.P. 307 ; Hughes v. Graeme, 33 L.J. Q.B. 335.

costs of unsuccessful legal proceedings taken by such person against the supposed principal for the purpose of enforcing the performance of the contract or of recovering damages for its breach ; provided that it was reasonable for proceedings to have been taken, or if the professed agent was made aware of the litigation and sanctioned it either expressly or by allowing it to be continued without avowing his authority.

The costs to be recovered as damages must not be too remote. ^{Costs must not be too remote.} Thus where there are two distinct contracts upon which two distinct causes of action arise, a person who defends the action against himself cannot recover the costs which he has incurred from the person whom he sues in his turn, even though the cause of action in each case arises out of precisely the same facts.^a

^a *Baxendale v. The London, Chatham & Dover R. Co.*, L.R. 10 Ex. 35 : 44 L.J. Ex. 20 ; followed also in *Fisher v. The Val de Travers Asphalte Co.*, 1 C.P. D. 511 : 47 L.J. C.P. 479.

1

APPENDICES.

PART I.

RULES OF THE SUPREME COURT, 1883.

APPENDIX A.—PART III.

SECTION III.

INDORSEMENT FOR COSTS.

And £ for costs ; and if the amount claimed be paid to the plaintiff or his solicitor within four days [*or if the writ is to be served out of the jurisdiction, or notice in lieu of service allowed, insert the time for appearances limited by the rules*] from the service hereof, further proceedings will be stayed.

APPENDIX F.

FORMS OF JUDGMENT.

No. 1.

DEFAULT OF APPEARANCE AND DEFENCE IN CASE OF LIQUIDATED DEMAND.

18 . [*Here put the letter and number.*]
In the High Court of Justice,
Division
Between *A.B.* Plaintiff,
and
C.D. and *E.F.* Defendants.
30th November, 18 .

The defendants [*or* the defendant *C.D.*] not having appeared to the writ of summons herein [*or* not having delivered any defence], it is this day adjudged that the plaintiff recover against the said defendant £ , and costs, to be taxed.

No. 3.

JUDGMENT IN DEFAULT OF APPEARANCE IN ACTION FOR RECOVERY OF LAND.

[*Heading as in Form 1.*]

30th November, 18 .

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the indorsement on the writ described as

No. 4.

JUDGMENT IN DEFAULT OF APPEARANCE AND DEFENCE AFTER ASSESSMENT OF DAMAGES

[*Heading as in Form 1.*]

30th November, 18 .

The defendants not having appeared to the writ of summons herein [*or*, not having delivered any defence], and a writ of inquiry dated 1876, having been issued directed to the sheriff of to assess the damages which the plaintiff was entitled to recover, and the said sheriff having by his return dated the 18 , returned that the said damages have been assessed at £ , it is adjudged that the plaintiff recover £ , and costs to be taxed.

No. 5.

JUDGMENT AFTER APPEARANCE AND ORDER UNDER ORDER XIV., RULE 1.

[*Heading as in Form 1.*]

The day of 18

The defendant having appeared to the writ of summons herein, and the plaintiff having by the order of , dated the day of 18 , obtained leave to sign judgment under the Rules of the Supreme Court, Order XIV., Rule 1, for [*recite order*]
It is this day adjudged that the plaintiff recover against the defendant £ [*or*, possession of the land in the indorsement on the writ described as] and costs to be taxed.

The above costs have been taxed and allowed at £ , as appears by a (taxing officer's) Certificate dated the day of 18 .

No. 7.

JUDGMENT AFTER TRIAL WITH A JURY.

[Heading as in Form 1.]

15th November, 18 .

The action having on the 12th and 13th November 18 been tried before the Honourable Mr. Justice with a special jury of the county of , and the jury having found [*state findings as in officer's certificate*], and the said Mr. Justice having ordered that judgment be entered for the plaintiff for £ and costs [*or as the case may be*]: Therefore it is adjudged that the plaintiff recover against the defendant £ and £ for his costs [*or that the plaintiff recover nothing against the defendant, and that the defendant recover against the plaintiff £ for his costs of defence, or as the case may be*].

No. 9.

JUDGMENT AFTER TRIAL OF QUESTIONS OF ACCOUNT BY REFEREE.

[Heading as in Form 1.]

The day of 18 .

The questions of account in this action having been referred to and he having found that there is due from the to the the sum of £ and directed that the do pay the costs of the reference

It is this day adjudged that the recover against the said £ and costs to be taxed.

The above costs have been taxed and allowed at £ as appears by a (taxing officer's) Certificate dated the day of 18 .

No. 11.

JUDGMENT AFTER TRIAL BY COURT WITHOUT JURY.

[Heading as in Form 1.]

This action having on the day of 18 been tried before and the said on the day of 18 having ordered that judgment be entered for the for £

It is this day adjudged that the recover from the £ and costs to be taxed.

The above costs have been taxed and allowed at £ , as appears by a (taxing officer's) Certificate dated the day of 18 .
Judgment entered the day of 18 .

No. 12.

JUDGMENT IN PURSUANCE OF ORDER.

[*Heading as in Form 1.*]

Pursuant to the Order of dated 18 whereby it was ordered and default having been made

It is this day adjudged that the plaintiff recover against the said defendant £ and costs to be taxed

The above costs have been taxed and allowed at £ , as appears by a (taxing officer's) Certificate dated the day of 18 .

No. 13

JUDGMENT ON CERTIFICATE OF REGISTRAR OF COUNTY COURT.

[*Heading as in Form 1.*]

The day of 18 .

This action having been ordered under section 26 of the County Court Act, 1856 (19 and 20 Vict. c. 108), to be tried in the county court of and the registrar of that court having certified that the result was

It is this day adjudged that recover against £ and costs to be taxed.

The above costs have been taxed and allowed at £ , as appears by a (taxing officer's) Certificate dated the day of 18 .

No. 14.

JUDGMENT FOR DEFENDANT'S COSTS ON DISCONTINUANCE.

[*Heading as in Form 1.*]

The day of 18 .

The plaintiff having by a notice in writing dated the day of 18 , wholly discontinued this action *or* withdrawn his claim in this action for *or* withdrawn so much of his claim in this action as relates to——*or as the case may be.*

It is this day adjudged that the defendant recover against the plaintiff costs to be taxed.

The above costs have been taxed and allowed at £ as appears by a Taxing Officer's Certificate dated the day of 18 .

No. 15.

JUDGMENT FOR PLAINTIFF'S COSTS AFTER CONFESSION OF DEFENCE.

[Heading as in Form 1.]

The day of 18 .

The defendant in his defence herein having alleged a ground of defence which arose after the commencement of this action, and the plaintiff having on the day of 18 delivered a confession of that defence,

It is this day adjudged that the plaintiff recover against the defendant costs to be taxed.

The above costs have been taxed and allowed at £ as appears by a Taxing Officer's Certificate dated the day of 18 .

No. 16.

JUDGMENT FOR COSTS AFTER ACCEPTANCE OF MONEY PAID INTO COURT.

[Heading as in Form 1.]

The day of 18 .

The defendant having paid into Court in this action the sum of £ in satisfaction of the plaintiff's claim, and the plaintiff having by his notice dated the day of 18 , accepted that sum in satisfaction of his entire cause of action, and the plaintiff's costs herein having been taxed, and the defendant not having paid the same within forty-eight hours after the said taxation ;

It is this day adjudged that the plaintiff recover against the defendant costs to be taxed.

The above costs have been taxed and allowed at £ , as appears by a Taxing Officer's Certificate dated the day of 18 .

No. 17.

JUDGMENT WHERE NO JUDGMENT ENTERED AT TRIAL BY JURY.

[Heading as in Form 1.]

The day of 18 .

This action having on the 18 been tried before and a jury of the of , and the jury having found and the not having thought fit to order any judgment to be entered. Now on motion before the Court for judgment on behalf of the , the Court having

It is this day adjudged that the recover against the the sum of £ and costs to be taxed.

The above costs have been taxed and allowed at £ , as appears
by a Master's Certificate dated the day of 18 .
Judgment entered the day of 18 .

No. 18.

JUDGMENT ON MOTION AFTER TRIAL OF ISSUE.

[*Heading as in Form 1.*]

The day of 18 .
The issues *or* questions of fact arising in this action [*or* cause *or*
matter] by the order dated the day of ordered to be tried
before having on the day of been tried before
and the having found Now on motion before the
Court for judgment on behalf of the , the Court having
It is this day adjudged that the recover against the
the sum of £ and costs to be taxed.
The above costs have been taxed and allowed at £ as appears
by a Master's Certificate dated the day of 18 .
Judgment entered the day of 18 .

APPENDIX H.

FORM OF WRIT.

No. 2.

FIERI FACIAS ON ORDER FOR COSTS.

[*Heading as in Form 1.*]

Victoria, by the Grace of God, &c., to the sheriff of greeting:
We command you, that of the goods and chattels of in your
bailiwick you cause to be made the sum of for certain costs which
by an order of Our High Court of Justice dated the day of
18 were ordered to be paid by the said to and which
have been taxed and allowed at the said sum, and interest on the said
sum at the rate of £4 per centum per annum from the day of
18 , and that you have the said sum and interest before us in
our said Court, immediately after the execution hereof, to be rendered
to the said And in what manner, &c. And have there then
this writ.

Witness, &c.

Levy £ and £ for costs of execution, &c., and also interest
on £ at £4 per centum per annum from the day of

18 , until payment ; besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses.

This writ was issued by, &c., of agent for of solicitor
for the

The is a and resides at in your bailiwick.

APPENDIX K.

No. 4.

ORDER FOR DIRECTIONS PURSUANT TO ORDER XXX.

[*Heading as in Form 1.*]

Upon hearing and upon reading it is ordered as follows :—

1. That the plaintiff deliver to the defendant further and better particulars with dates and items of his claim, and that unless such particulars be delivered within days from the date of this order, all further proceedings be stayed until the delivery thereof.

2. That the plaintiff and defendant be at liberty to deliver to each other interrogatories in writing, and that the said parties do respectively answer the said interrogatories as prescribed by Order XXXI., rules 8 and 26.

3. That the be at liberty to issue a commission for the examination of witnesses on his behalf at and that the trial of the action be stayed until the return of the said commission, the usual long order for the said commission to be drawn up, and unless agreed upon by the parties within one week, to be settled by the Master.

4. That the action be tried in the county of by a Judge.

5. That either party be at liberty without further summons, to apply to the Master herein for further directions, such application to be made upon two clear days' notice to be served upon the other party.

6. That the costs of this application *be costs in the action.*

Dated the day of 18 .

No. 6.

ORDER UNDER ORDER XIV., No. 1.

[*Heading as in Form 1.*]

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the plaintiff may sign final judgment in this action for the amount endorsed on the writ, with interest, if any, [*or posses-*

sion of the land in the indorsement of the writ described as]
 and costs to be taxed, and that the costs of this application be
 Dated the day of 18 .

No. 8.

ORDER UNDER ORDER XIV., No. 3.

[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed
 the day of 18 , and

It is ordered that if the defendant pay into Court within a week
 from the date of this order the sum of £ , he be at liberty to
 defend this action by delivering a defence within days after service
 of this order, but that if that sum be not so paid the plaintiff be at
 liberty to sign final judgment for the amount indorsed on the writ of
 summons, *with interest, if any*, and costs, and that in either event the
 costs of this application be

Dated the day of 18 .

No. 15.

ORDER TO DISMISS FOR WANT OF PROSECUTION.

[*Heading as in Form 1.*]

Upon hearing
 and upon reading the affidavit of filed the
 day of 18 , and

It is ordered that this action be, for want of prosecution, dismissed
 with costs to be taxed and paid to the defendant by the plaintiff, and
 that the costs of this application be

Dated the day of 18 .

No. 29.

CHARGING ORDER. SOLICITOR'S COSTS.

[*Heading as in Form 1.*]

Upon hearing and upon reading the affidavit of filed
 the day of 18 , and

It is ordered that the said the solicitor for the in this
 action shall have a charge upon for his costs, charges, and ex-
 penses of and in reference to this action.

Dated the day of 18 .

No. 41.

ORDER ON CLIENT'S APPLICATION TO TAX SOLICITOR'S BILL OF COSTS.

18 . [*Here put the letter and number.*]

In the High Court of Justice.

Division.

in Chambers.

In the matter of the taxation of costs, and in the matter of Gentleman, one of the Solicitors of the Supreme Court.

It is ordered that the bill of fees, charges, and disbursements delivered to the applicant by the above-named solicitor be referred to the taxing officer to be taxed, and that the said solicitor give credit for all sums of money by him received of or on account of the applicant, and that he refund what, if anything, he may on such taxation appear to have been overpaid.

And it is further ordered that if the said solicitor attends on the taxation, the taxing officer tax the costs of the reference, and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be charged (if payable) according to the event of the taxation, pursuant to the statute.

And it is further ordered that the said solicitor do not commence or prosecute any cause or matter touching the demand pending the reference.

And it is further ordered that upon payment by the applicant of what (if anything) may appear to be due to the said solicitor the said solicitor do (if required) deliver up to the applicant, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the applicant.

And it is ordered that the costs of this application be

Dated the day of 18

No. 42.

ORDER ON SOLICITOR'S APPLICATION TO TAX BILL OF COSTS.

18 . [*Here put the letter and number.*]

In the High Court of Justice.

Division.

in Chambers.

In the matter of the taxation of costs, and in the matter of Gentleman, one of the Solicitors of the Supreme Court.

Upon hearing and upon reading the affidavit of filed the
day of 18 , and

It is ordered that the above-named solicitor's bill of fees, charges,

and disbursements, delivered to (hereinafter called the said client) be referred to the taxing officer to be taxed, and that the said solicitor give credit for all sums of money by him received from or on account of the said client, and that he refund what, if anything, he may on such taxation appear to have been overpaid.

And it is further ordered that the taxing officer tax the costs of the reference and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be paid according to the event of the taxation pursuant to the statute.

And it is further ordered that the said solicitor do not commence or prosecute any cause or matter touching the demand pending the reference.

And it is further ordered that upon payment by the said client of what (if anything) may appear to be due to the said solicitor the said solicitor do (if required) deliver to the said client, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the said client.

And it is ordered that the costs of this application be

Dated the day of 18 .

No. 43.

ORDER TO TAX AFTER ACTION BROUGHT.

[Heading as in Form 1.]

Upon hearing and upon reading the affidavit of filed
the day of 18 , and

It is ordered that the plaintiff's bill of costs, charges, and disbursements delivered to the defendant, for the recovery of which this action is brought, be referred to the taxing officer to be taxed, and that the plaintiff give credit of the time of taxation for all sums of money by him received from or on account of the defendant.

And it is further ordered that the taxing officer tax the costs of the reference, and certify what upon such reference shall be found due to or from either party in respect of the bill and demand, and of the costs of the reference, pursuant to the statute.

And it is further ordered that the plaintiff do not prosecute this action touching the demand pending the reference.

And it is further ordered that upon payment of what (if anything) may appear to be due to the plaintiff, together with the costs of this action (which are to be also taxed and paid) all further proceedings therein be stayed, and that the costs of this application be

Dated the day of 18 .

No. 45.

ORDER TO GIVE SECURITY OR TRY ACTION IN COUNTY COURT.

[Heading as in Form 1.]

Upon hearing and upon reading the affidavit of , filed
the day of 18 , and

It is ordered that unless the plaintiff within give full security
for the defendant's costs to the satisfaction of the Master [*or as the case
may be*], this action be remitted for trial before the County Court of
holden at and that the costs of this application be

Dated the day of 18 .

No. 52.

INTERPLEADER ORDER, No. 3.

18 . [*Here put the letter and number.*]

In the High Court of Justice.
Division.

in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor, and the sheriff of
Respondents.

Upon hearing and upon reading the affidavit of filed the
day of 18 , and

It is ordered that the said sheriff proceed to sell the goods seized by
him under the writ of fieri facias issued herein, and pay the nett pro-
ceeds of the sale, after deducting the expenses thereof, into Court in
this cause, to abide further order herein.

And it is further ordered that the parties proceed to the trial of an
issue in the High Court of Justice, in which the said claimant shall be
the plaintiff and the said execution creditor shall be the defendant, and
that the question to be tried shall be whether at the time of the seizure
by the sheriff the goods seized were the property of the claimant as
against the execution creditor.

And it is further ordered that this issue be prepared and delivered by
the plaintiff therein within from this date, and be returned by the
defendant therein within days, and be tried at

And it is further ordered that the question of costs and all further
questions be reserved until the trial of the said issue, and that no
action shall be brought against the said sheriff for the seizure of the
said goods.

Dated the day of 18 .

No. 53.

INTERPLEADER ORDER, No. 4.

[*Heading as in Form 52.*]

Upon hearing, &c.

It is ordered that upon payment of the sum of £ into Court by the said claimant within from this date, or upon his giving within the same time security to the satisfaction of the Master [*or as the case may be*] for the payment of the same amount by the said claimant according to the directions of any order to be made herein, and upon payment to the above-named sheriff of the possession money from this date, the said sheriff do withdraw from the possession of the goods seized by him under the writ of fieri facias herein.

And it is further ordered that unless such payment be made or security given within the time aforesaid the said sheriff proceed to sell the said goods, and pay the proceeds of the sale, after deducting the expenses thereof and the possession money from this date, into Court in the cause, to abide further order herein.

And it is further ordered that the parties proceed, &c.

And it is further ordered that this issue, &c.

And it is further ordered that the question of costs, &c.

Dated the day of 18 .

No. 54.

INTERPLEADER ORDER, No. 5.

[*Heading as in Form 52.*]

Upon hearing, &c.

It is ordered that upon payment of the sum of £ into Court by the said claimant, or upon his giving security to the satisfaction of the Master [*or as the case may be*] for the payment of the same amount by the claimant according to the directions of any order to be made herein, the above-named sheriff withdraw from the possession of the goods seized by him under the writ of fieri facias issued herein.

And it is further ordered that in the meantime, and until such payment made or security given, the sheriff continue in possession of the goods, and the claimant pay possession money for the time he so continues, unless the claimant desire the goods to be sold by the sheriff, in which case the sheriff is to sell them and pay the proceeds of the sale, after deducting the expenses thereof and the possession money from this date, into Court in the cause, to abide further order herein.

And it is further ordered that the parties proceed, &c.

And it is further ordered that this issue, &c.

And it is further ordered that the question of costs, &c.

Dated the day of 18 .

No. 57.

ORDER DISMISSING SUMMONS (GENERALLY).

[Heading as in Form 1.]

Upon hearing
and upon reading the affidavit of filed the day of 18 ,
and

It is ordered that the application of be dismissed * with costs
to be taxed and paid by the to the (or,* and that the costs
of and occasioned by this application be the 's in any event).
Dated the day of 18 .

The following rules of Order 22 and the regulations contained in Appendix M provide for the manner in which money is to be paid into and out of Court, and also how it is to be dealt with after it has been paid in :—

Rule 10. Where money is paid into Court in the Queen's Bench Division under the certificate of a master or associate, such payment must be expressly authorized in such certificate.

Rule 11. Money paid into Court under an order of the Court or a judge or certificate of a master or associate shall not be paid out of Court except in pursuance of an order of the Court or a judge : provided that, where before the delivery of defence money has been paid into Court by the defendant pursuant to an order under the provisions of Order 14, he may (unless the Court or a judge shall otherwise order) by his pleading appropriate the whole or any part of such money, and any additional payment if necessary, to the whole or any specified portion of the plaintiff's claim ; and the money so appropriated shall thereupon be deemed to be money paid into Court pursuant to the preceding rules of this Order relating to money paid into Court, and shall be subject in all respects thereto.

Rule 12. In the Chancery Division, the manner of payment into and out of Court, and the manner in which money in Court shall be dealt with, shall be subject to the rules for the time being in force under the Court of Chancery Funds Act, 1872.

Rule 13. In the Queen's Bench Division, unless the cause or matter is proceeding in a district registry, and unless and until any other provision shall be made by Parliament in that behalf, money paid into Court shall be paid into the Bank of England (Law Courts Branch), and the manner of payment into and out of Court, and the manner in which money in Court shall be dealt with, shall be subject to the regulations contained in Appendix M, which the masters of the Supreme Court, or any four of them, with the consent of the Governor and Company of the Bank of England, may from time to time modify by way of addition or substitution ; provided that if any Act shall be passed relating to funds in Court in any Division of the Supreme

Court, all money so paid into Court shall be subject to such rules as may be made under that Act, so far as applicable thereto.*

Rule 14. All money standing in Court in the Queen's Bench Division on the day on which these rules come into operation shall thereupon be subject in all respects to the provisions of this Order.

Rule 15. In any cause or matter in the Queen's Bench Division in which a sum of money has been awarded to or recovered by an infant, or person of unsound mind not so found by inquisition, the Court or a judge may at or after the trial order that the whole or any part of such sum shall be paid into Court to the credit of an account intituled in the cause or matter; and any sum so paid into Court, and any dividends or interest thereon shall be subject to such orders as may from time to time be made by the Court or a judge concerning the same, and may either be invested, or be paid out of Court, or transferred to such persons, to be held and applied upon and for such trusts and in such manner, as the Court or judge shall direct.

Rule 16. Money paid into Court or securities purchased under the provisions of the last preceding rule, and the dividends or interest thereon, shall be sold, transferred, or paid out to the party entitled thereto, pursuant to the order of the Court or a judge.

Rule 17. Cash under the control of or subject to the order of the Court may be invested in Bank Stock, East India Stock, Exchequer Bills, and £2 10s. per cent. annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated, Reduced, and New £3 per cent. annuities.

Rule 18. Every application for the purpose of the conversion of any stocks, funds, or securities into any other stocks, funds, or securities authorized by the last preceding rule, shall be served upon the trustees thereof, if any, and upon such other persons, if any, as the Court or judge shall think fit.

APPENDIX M.

PAYMENT INTO AND OUT OF COURT.

1. Any party who intends to pay money into Court will on request at the Bank of England (Law Courts Branch), hereinafter called the Bank, be furnished with a form of request which must be filled up as hereinafter provided, and signed by such party or his solicitor. The money will then be received by the Bank, and an official receipt for the money will be given. Where the money is paid in upon a notice or pleading, such notice or pleading must be produced at the Bank

* The rules do not make any provision as regards payment into Court where the cause or matter is proceeding in a district registry, but it is presumed that the practice will be continued of paying the money to the proper officer at the district registry, whose duty it is to give a receipt; and this is usually done by writing out or stamping the receipt on the margin of the defence or counterclaim, as the case may be.

at the time the money is paid in, and the receipt will be given on the margin thereof.

2. In filling up the request mentioned in the last preceding regulation, the party paying the money into Court shall enter thereon the letter, number, and short title of the action, and the name of the party by whom the payment is made, and also such one of the following statements as may be applicable to the circumstances under which the money is paid in, viz. :—

(a.) Where the money is paid in under the provisions of rule 5 of Order 22, an entry in the following form :—

A. Paid in in satisfaction of claim of above-named (name of party).

(b.) Where the money is paid in under the provisions of rule 6 of Order 22, an entry in the following form :—

B. Paid in against claim of above-named (name of party), with defence, denying liability.

(c.) Where the money is paid in under the provisions of rule 26 of Order 31, an entry in the following form :—

C. Paid in to "Security for Costs Account."

(d.) Where the money is paid in under an order or certificate, an entry in the following form :—

D. Paid in under order (or certificate) dated the
day of

Upon the money being paid in, an entry corresponding with the entry in the request shall be made in the books of the Bank, and in the receipt given by the Bank for the money, whether such receipt be endorsed on a notice or pleading, or be a separate document.

3. Where a defendant has paid money into Court under an order, and desires to appropriate the whole or any part of such money to the whole or any specified portion of the plaintiff's claim, pursuant to rule 11 of Order 22, he or his solicitor shall lodge at the Bank the original receipted order and a notice, intituled with the letter, number, and short title of the action, and in such one of the following forms as may be applicable to the case, viz. :—

A. Take notice that £ of the money in Court herein, is appropriated by the above-named (name of party) to the satisfaction of claim of the above-named (name of party).

B. Take notice that £ of the money in Court herein, is placed by the above-named (name of party) against the claim of the above-named (name of party) with a defence, denying liability.

Upon such notice being lodged at the Bank, an entry corresponding

thereto shall be made in the books of the Bank, and the money mentioned in the notice shall thereupon, for the purposes of payment out, be subject in all respects to regulations 4 and 5. A record of such appropriation shall be made by the Bank on the original receipted order, and the Bank will give a receipt in the usual form for the money so appropriated.

4. Where, upon the payment of the money into Court, the request contains a statement in the Form A of regulations 2 and 3, unless an order restraining the payment out of Court has, prior to the issue of the cheque hereinafter mentioned, been lodged at the Bank, the money will be paid out on request to the plaintiff or, on his written authority, to his solicitor.

5. Where, upon the payment of the money into Court, the request contains a statement in the Form B of regulations 2 and 3, the following regulations shall apply :—

(a.) If the plaintiff accepts the sum paid in in satisfaction, he or his solicitor shall lodge at the Bank a notice, intituled with the letter, number, and short title of the action, and in the following form :—

“Take notice that the sum paid in herein has been accepted by
“the above-named [name of party] in satisfaction, and that I
“have given due notice of my acceptance thereof.”

Such notice shall be sufficient evidence to the Bank of compliance by the plaintiff with all the conditions entitling him under Order 22 to have the sum in question paid out to him, and such notice being lodged, the money will on request be paid out to the party mentioned in such notice, or on his written authority to his solicitor.

(b.) Unless such a notice as is above-mentioned is lodged at the Bank, the money will not be paid out except on production at the Bank of an order of the Court, or a judge.

6. Where, upon the payment of the money into Court, the request contains a statement in the Form C of regulations 2 and 3, if, after the cause or matter has been finally disposed of, the party who paid the money in is entitled, under Order 31, rule 27, to have the money paid out to him, the taxing officer shall, on the taxation of the costs, give to such party a certificate that he is so entitled ; and upon production of such certificate at the Bank, unless an Order restraining the payment out of Court has previously been lodged at the Bank, the money mentioned in the certificate will on request be paid out to the party mentioned in the certificate as entitled thereto, or on his written authority to his solicitor. Except as above provided, where, upon the payment of the money into Court, the request contains a statement in either of the Forms C or D, the money will not be paid out except on production at the Bank of an order of the Court or a judge.

7. On bespeaking payment out of Court of money paid in on a notice or pleading, the original receipted notice or pleading must be lodged at the Bank.

8. Where money is to be paid out under an order or authority, on bespeaking the payment out the order or authority must be lodged at the Bank, and after having been examined by the Bank must be filed in the Filing Department of the Central office; and a certificate of its having been so filed must be lodged at the Bank on receiving the cheque.

9. Every authority for the payment of money out of Court must be attested by a witness, whose residence and description must be added to his attestation.

10. Each sum paid into Court shall, as regards its payment out of Court, be deemed (when the time for payment out arrives) to be money standing to the credit of the Masters.

11. All payments out shall be authorized by cheques upon the Bank, filled in by the Bank, and drawn in favour of the party claiming to receive the money. One clear day shall be allowed for the preparation of the cheque, and it shall be signed by one of the Masters, and made payable to order, crossed specially or generally and marked "not negotiable."

12. Whenever the cheque is required to be drawn in favour of any person not a solicitor of the Supreme Court, the Bank may require him to be identified by a solicitor. If such person shall be represented in the cause or matter by a solicitor, the identifying solicitor must be such solicitor; and in case a solicitor, on requiring the cheque to be made payable to himself, or on identifying any person receiving such cheque, shall not be known at the Bank, the Bank may, at their discretion, require, on delivery of the cheque the production by such solicitor of his annual certificate.

13. Where an order directs that money paid into Court is to be invested, the Master to whom the cause or matter is assigned, shall, in the case of an investment, direct the Bank to invest such money in the securities mentioned in the Order, and to pay the money necessary for such investment to the Government broker, conditionally upon his causing the securities to be transferred to the credit of the Masters or persons named in the order or direction; and the said direction shall specify the title of the cause or matter to the credit of which the securities purchased is to be placed in the books of the Bank.

14. The Bank, on receipt of a direction to invest, shall cause the securities mentioned therein to be purchased in the name of the Masters, or other persons mentioned in the direction, and shall receive and retain the certificate issued by the body corporate, or company, in whose books the securities purchased are registered, and the said certificate shall be sufficient evidence for all purposes that the purchase of such securities has been actually made; and the securities so purchased shall be placed in the books of the Bank to the same credit as that to which the money was paid in, unless the order of the Court or a judge otherwise directs.

15. The dividends on the securities purchased shall, as and when the same respectively are received or become due, be placed in the books to the same credit as that to which the money was originally paid in.

16. When securities are to be sold, the Master to whom the cause or matter is assigned shall direct the Bank to receive the proceeds of the sale, and place the same to the credit of such cause or matter, and the Bank shall, upon receipt of the necessary direction, cause the necessary sale to be carried out and the proceeds of such sale to be placed to the credit of the cause or matter mentioned in the direction.

17. The books kept by the Bank relating to payments of money into and out of Court shall be open at all times for inspection by the Masters; but no other person not belonging to the Bank shall be entitled to inspect such books without the written authority of a Master.

18. In any case in which an affidavit is required an office copy must be produced at the Bank. All forms to be used under these regulations shall be framed by the Masters, with the approval of the Governor and Company of the Bank of England.

APPENDIX N.

COSTS.

	Higher Scale	Lower Scale
WRITS, SUMMONSES, AND WARRANTS.	£ s. d.	£ s. d.
Writ of summons for the commencement of any action	0 13 4	0 6 8
And for indorsement of claim, if special	0 5 0	0 5 0
Concurrent writ of summons	0 6 8	0 6 8
Renewal of a writ of summons	0 6 8	0 6 8
Notice of a writ for service in lieu of writ out of jurisdiction	0 5 0	0 4 0
Writ of inquiry	1 1 0	1 1 0
Writ of mandamus	1 1 0	0 10 0
Or per folio	0 1 4	0 1 4
Writ of subpoena ad testificandum or duces tecum	0 6 8	0 6 8
And if more than four folios, for each folio beyond four	0 1 4	0 1 4
Writ or writs of subpoena ad testificandum for any number of persons not exceeding three, and the same for every additional number not exceeding three	0 6 8	0 6 8
Writ of distringas, pursuant to statute 5 Vict. c. 5	0 13 4	0 13 4

	Higher Scale	Lower Scale
	£ s. d.	£ s. d.
Writ of execution, or other writ to enforce any judgment or order	0 10 0	0 7 0
And if more than four folios, for each folio beyond four	0 1 4	0 1 4
Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal	0 6 8	0 6 8
Notice thereof to serve on sheriff	0 5 0	0 4 0
Any writ not included in the above	0 10 0	0 7 0
These fees include all indorsements and copies, or præcipes, for the officer sealing them, and attendances to issue or seal, except where otherwise provided, but not the Court fees		
Summonses to attend at Judges' Chambers	0 6 8	0 3 0
Or if special, at taxing officer's discretion, not exceeding	1 1 0	0 13 4
Copy for the judge, when required	0 2 0	0 2 0
Or per folio	0 0 4	0 0 4
SERVICES AND NOTICES.		
Service, or filing in lieu of service, of any writ, summons, warrant, interrogatories, petition, order, or notice on a party who has not entered an appearance, and if not authorized to be served by post	0 5 0	0 5 0
If served at a distance of more than two miles from the nearest place of business, or office of the solicitor serving the same, for each mile beyond such two miles therefrom	0 1 0	0 1 0
Where, in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), <i>for correspondence</i> in addition	0 7 0	0 7 0
Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.		
For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.		
Service where an appearance has been entered on the solicitor or party	0 2 6	0 2 6

	Higher Scale	Lower Scale
Or if authorized to be served by post	£ s. d. 0 1 6	£ s. d. 0 1 6
Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.		
In addition to the above fees, the following allowances are to be made :—		
As to writs, if exceeding two folios, for copy for service, per folio beyond such two	0 0 4	0 0 4
As to summons to attend at the Judges' Chambers, for each copy to serve	0 2 0	0 1 0
Or per folio	0 0 4	0 0 4
For preparing notice to produce on the trial or hearing of an action, or notice to admit	0 7 6	0 5 0
If special or necessarily long, such allowance as the taxing officer shall think proper, not exceeding per folio	0 1 0	0 0 8
And for each copy, such allowance as the taxing officer shall think proper, not exceeding per folio	0 0 4	0 0 4
For preparing notice of motion	0 5 0	0 3 0
Or per folio	0 1 0	0 1 0
Copy for service	0 1 0	0 1 0
Or per folio	0 0 4	0 0 4
For preparing any necessary or proper notice, not otherwise provided for, or any demand, pursuant to Order 7, rules 1 and 2	0 1 6	0 1 6
Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three	0 1 0	0 1 0
And for each copy for service, per folio beyond such three	0 0 4	0 0 4
Copies for service of interrogatories and petitions, and of orders with necessary notices (if any) to accompany, per folio	0 0 4	0 0 4
Except as otherwise provided, the allowances for services include copies for service.		
Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together.		
Where any appointment is or ought to be adjourned, service of a notice of the adjourn-		

	Higher Scale	Lower Scale
ment, or next appointment, is not to be allowed.	£ s. d.	£ s. d.
APPEARANCES.		
Entering any appearance	0 6 8	0 6 8
If entered at one time, for more than one person, for every defendant beyond the first	0 2 0	0 1 0
If a person appearing to a writ of summons to recover land limits his defence by his memorandum of appearance, in addition to the above	0 6 8	0 6 8
INSTRUCTIONS.		
To sue or defend	0 13 4	0 6 8
For statement of claim or special case	2 2 0	0 13 4
For indorsement of writ of summons when no further statement of claim	1 1 0	0 13 4
For originating summons 6s. 8d., or not to exceed	1 1 0	1 1 0
For defence or further defence.	0 13 4	0 6 8
For counter claim	0 13 4	0 6 8
For reply when defendant sets up a counter claim	1 1 0	0 13 4
For reply or further reply in any other case with or without joinder of issue	0 13 4	0 6 8
For confession of defence	0 13 4	0 6 8
For joinder of issue without other matter	0 13 4	0 6 8
For special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness.	0 13 4	0 6 8
To amend any pleading	0 13 4	0 6 8
For affidavit in answer to interrogatories, and other special affidavits	0 6 8	0 6 8
To appeal against order of Court or judge, and to appear thereon	1 1 0	0 13 4
To add parties by order of Court or judge	0 13 4	0 6 8
For counsel to advise on evidence when the evidence in chief is to be taken orally	0 6 8	0 6 8
Or not to exceed	1 1 0	1 1 0
For counsel to make any application to a Court or judge where no other brief	0 10 0	0 6 8
For brief on motion for special injunction	1 1 0	0 13 4

	Higher Scale	Lower Scale
	£ s. d.	£ s. d.
For brief on hearing or trial of action upon notice of trial or notice for judgment given, whether such trial be before a judge, with or without a jury, or before an official or special referee, or on trial of an issue of fact before a judge, commissioner, or referee, or on assessment of damages	2 2 0	1 1 0
For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence.		
The fees for instructions for brief are to apply to a hearing on further consideration in Court only where an order for accounts and inquiries was made without such hearing or trial, as above mentioned.		
DRAWING PLEADINGS AND OTHER DOCUMENTS.		
Statement of claim	1 1 0	0 10 0
Or per folio	0 1 0	0 1 0
Defence	0 10 0	0 5 0
Or per folio	0 1 0	0 1 0
Counter claim	1 1 0	0 5 0
Or per folio	0 1 0	0 1 0
Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, and any other pleading (not being a petition or summons) and amendments of any pleading	0 10 0	0 5 0
Or per folio	0 1 0	0 1 0
Particulars, breaches, and objections, when required, and one copy to deliver	0 6 8	0 5 0
Or such amount as the taxing officer shall think fit, not exceeding per folio	0 1 0	0 0 8
If more than one copy to be delivered, for each other copy per folio	0 0 4	0 0 4
Special case, whether original or in an action, affidavits in answer to interrogatories and other special affidavits, special petitions, and interrogatories, per folio	0 1 0	0 1 0

	Higher Scale	Lower Scale
	£ s. d.	£ s. d.
Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, special case and petition before a Court or judge, sheriff, commissioner, referee, examiner, or officer of the Court, <i>when necessary and proper in addition to pleadings, including necessary and proper observations, per folio</i>	0 1 0	0 1 0
Brief on application to add parties	0 10 0	0 6 8
Or per folio	0 1 0	0 1 0
Brief on further consideration, per sheet of 10 folios	0 6 8	0 6 8
Accounts, statements, and other documents for the Judges' Chambers, when required, not exceeding per folio	0 1 0	0 0 8
Advertisements to be signed by judge's clerk, including attendance therefor	0 13 4	0 6 8
Bills of costs for taxation, including copy for the taxing officer	0 0 8	0 0 8
COPIES.		
Of pleadings, briefs, and other documents where no other provision is made, at per folio	0 0 4	0 0 4
Where, pursuant to Rules of Court, any pleading, special case or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the court), at per folio	0 0 4	0 0 4
And for examining the proof print, at per folio	0 0 2	0 0 2
And for printing the amount actually and properly paid to the printer, not exceeding per folio	0 1 0	0 1 0
And in addition for every 20 beyond the first 20 copies, at per folio	0 0 1	0 0 1
And where any part shall properly be printed in a foreign language, or as a fac-simile, or in any unusual or special manner, or where any alteration in the document being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable.		

	Higher Scale	Lower Scale
These allowances are to include all attendances on the printer.	£ s. d.	£ s. d.
The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor.		
In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes (<i>videlicet</i>) :		
Of any pleading for delivery to the opposite party, or filing in default of appearance		
Of any special case for filing		
Of any petition of right for presentation, if presented in print, and for the solicitor of the Treasury, and service on any party		
Of any pleading, special case, or petition of right, for the use of the Court or judge		
Of any affidavit to be sworn to in print		
And of any pleading, special case, petition of right, or evidence for the use of counsel in Court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor, at per folio	0 0 3	0 0 2
Such additional allowances for printed copies for the Court or judge, and for counsel, are not to be made where written copies have been made previously to printing, and are not in any case to be made more than once in the progress of the cause.		
Close copies, whether printed or written, are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing officer		
Inserting amendments in a printed copy of any pleading, special case, or petition of right, when not reprinted	0 5 0	0 1 0
Or per folio	0 0 4	0 0 4
PERUSALS.		
Of statement of claim, defence, reply, joinder of issue, and other pleading (not being a		

	Higher Scale	Lower Scale
petition in a pending cause or matter, or summons other than the originating summons), by the solicitor of the party to whom the same are delivered	£ s. d. 0 13 4	£ s. d. 0 6 8
Or per folio	0 0 4	0 0 4
Of amendment of any such pleading in writing	0 6 8	0 6 8
Or per folio	0 0 4	0 0 4
If same reprinted	0 13 4	0 6 8
Or per folio of amendment	0 0 4	0 0 4
Of interrogatories to be answered by a party by his solicitor	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of special case by the solicitor of any party except the one by whom it is prepared	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of copy order to add parties, notice of defendant's claim against any person not a party to the action under Order 16, rule 49, and of defendant's defence and counter claim served on a person not a party under Order 21, rule 13, by the solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of claim is also to be allowed unless the solicitor has been previously allowed such perusal	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of notice to produce on trial or hearing of action, and notice to admit by the solicitor of the party served	0 13 4	0 6 8
Or (if to admit facts) under Order 32, rule 4, per folio	0 1 0	0 1 0
Of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of other special affidavits by the solicitor of the party against whom the same can be read, per folio	0 0 4	0 0 4
ATTENDANCES.		
To obtain consent of next friend to sue in his name or of a guardian <i>ad litem</i>	0 13 4	0 6 8
To deliver, or file in lieu of delivery, any pleading (not being a petition or summons) and a special case	0 6 8	0 3 4

	Higher Scale	Lower Scale
To inspect, or produce for inspection, documents pursuant to a notice to admit	£ s. d. 0 13 4	£ s. d. 0 6 8
Or per hour	0 6 8	0 6 8
To examine and sign admissions	0 13 4	0 6 8
To inspect, or produce for inspection, documents referred to in any pleading, notice in lieu of pleading, or affidavit, pursuant to notice under Order 31, rule 14.	0 6 8	0 6 8
Or per hour	0 6 8	0 6 8
To obtain or give any necessary or proper consent	0 6 8	0 6 8
To obtain an appointment to examine witnesses	0 6 8	0 6 8
On examination of witnesses before any examiner, commissioner, officer, or other person	0 13 4	0 13 4
Or according to circumstances, not to exceed	2 2 0	2 2 0
Or if without counsel, not to exceed	3 3 0	3 3 0
On deponents being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit	0 6 8	0 6 8
On a summons at Judges' Chambers	0 6 8	0 6 8
Or according to circumstances, not to exceed	1 1 0	1 1 0
In the Chancery Division, all allowances for attending at the Judges' Chambers are to be by the judge or chief clerk as heretofore.		
To file chief clerks' and taxing masters' certificates, and get copy marked as an office copy	0 6 8	0 6 8
On counsel with brief or other papers—		
If counsel's fee one guinea	0 6 8	0 3 4
If more and under five guineas	0 6 8	0 6 8
If five guineas and under 20 guineas	0 13 4	0 6 8
If 20 guineas	1 1 0	0 13 4
If 40 guineas or more	2 2 0	—
On consultation or conference with counsel	0 13 4	0 13 4
To enter or set down action, special case, or appeal, for hearing or trial	0 6 8	0 6 8
In Court on motion of course and on counsel and for order	0 13 4	0 10 0
To present petition for order of course and for order	0 13 4	0 10 0
In Court on every special motion, each day	0 13 4	0 6 8
On same when heard each day	0 13 4	0 13 4
Or according to circumstances, not to exceed	2 2 0	2 2 0
On special case, or special petition, or application adjourned from the Judges' Chambers,		

	Higher Scale	Lower Scale
when in the special paper for the day, or likely to be heard	£ s. d. 0 10 0	£ s. d. 0 6 8
On same when heard	1 1 0	0 13 4
Or according to circumstances, not to exceed .	2 2 0	2 2 0
On hearing or trial of any cause, or matter, or issue of fact, in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a judge with or without a jury, or commissioner, or referee, or on assessment of damages, when in the paper .	0 10 0	0 10 0
When heard or tried	1 1 0	0 13 4
Or according to circumstances, not to exceed .	3 3 0	3 3 0
When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent	3 3 0	3 3 0
And expenses (besides actual reasonable travelling expenses) each day, including Sundays .	1 1 0	1 1 0
Or if the solicitor has to attend on more than one trial or assessment at the same time and place, in each case	1 11 6	1 1 0
The expenses in such case to be rateably divided		
To hear judgment when same adjourned . .	0 13 4	0 6 8
Or according to circumstances	1 1 0	0 13 4
To deliver papers (when required) for the use of a judge prior to a hearing	0 6 8	0 6 8
If more than one judge	0 13 4	0 13 4
On taxation of a bill of costs	0 6 8	0 6 8
Or according to circumstances, not to exceed .	2 2 0	2 2 0
Unless the same shall necessarily occupy so much time that the taxing officer shall consider such amount inadequate, in which case he may allow such further fee as he shall think proper.		
In actions and matters for purposes within the cognizance of the Court of Chancery before the Principal Act came into operation, such further fee as the taxing officer may think fit, not exceeding the allowances heretofore made.		
To obtain or give an undertaking to appear .	0 6 8	0 6 8
To present a special petition, and for same answered	0 6 8	0 6 8
On printer to insert advertisement in Gazette .	0 6 8	0 6 8
On printer to insert same in other papers, each printer	0 6 8	—

	Higher Scale	Lower Scale
	£ s. d.	£ s. d.
Or every two	—	0 6 8
On registrar to certify that a cause set down is settled, or for any reason not to come into the paper for hearing	0 6 8	0 6 8
For an order drawn up by chief clerk, and to get same entered	0 6 8	0 6 8
On counsel to procure certificate that cause proper to be heard as a short cause, and on registrar to mark same	0 6 8	0 6 8
To mark conveyancing counsel or taxing master	0 6 8	0 6 8
For preparing and drawing up an order made at chambers in proceedings to wind-up a company and attending for same, and to get same entered	0 13 4	0 13 4
And for engrossing every such order, per folio	0 0 4	0 0 4
NOTE.—An order of course means an order made on an <i>ex parte</i> application, and to which a party is entitled as of right on his own statement and at his own risk.		
To examine an abstract of title with deeds, per hour, in a cause or matter	0 10 0	0 10 0
To produce deeds for such purpose, per hour	0 6 8	0 6 8
OATHS AND EXHIBITS.		
Commissioners to take oaths or affidavits. For every oath, declaration, affirmation, or attestation upon honour in London or the country.	0 1 6	0 1 6
The solicitor for preparing each exhibit in town or country	0 1 0	0 1 0
The commissioner for marking each exhibit	0 1 0	0 1 0
TERM FEES.		
For every term commencing on the day the sittings in London and Middlesex of the High Court of Justice commence, and terminating on the day preceding the next such sittings, in which a proceeding in the cause or matter by or affecting the party, after appearance entered, shall take place	0 15 0	0 15 0
And further, in country agency causes or matters, for letters	0 6 0	0 6 0

	Higher Scale	Lower Scale
Where no proceeding in the cause or matter is taken which carries a term fee, a charge for letters may be allowed, if the circumstances require it.	£ s. d.	£ s. d.
In addition to the above an allowance is to be made for the necessary expense of postages, carriage and transmission of documents.		

APPENDIX O.

- (1.) The several Rules, Orders, and forms contained in the Schedule and appendix to the Supreme Court of Judicature Act (1873) Amendment Act.
- (2.) The additional Rules to the Judicature Act, 1875.
- (3.) The Rules of the Supreme Court, December, 1875.
- (4.) The Rules of the Supreme Court, February, 1876.
- (5.) The Rules of the Supreme Court, June, 1876.
- (6.) The Rules of the Supreme Court, December, 1876.
- (7.) The Rules of the Supreme Court, May, 1877.
- (8.) The Rules of the Supreme Court (Costs).
- (9.) The Rules of the Supreme Court, June, 1877.
- (10.) The Rules of the Supreme Court, November, 1878.
- (11.) The Rules of the Supreme Court, March, 1879.
- (12.) The Rules of the Supreme Court, December, 1879.
- (13.) The Rules of the Supreme Court, April, 1880.
- (14.) The Rules of the Supreme Court, May, 1880.
- (15.) The Rules of the Supreme Court, May, 1883.
- (16.) The Regulæ Generales of Hilary Term, 1853, dated 11th January, 1853 (except the Rules as to juries).
- (17.) Regulæ Generales, as to Pleading made by the judges in pursuance of the Common Law Procedure Act, 1852, dated the 10th of May, 1853.
- (18.) The Rules under the 6th section of the Debtor's Act, 1869.
- (19.) The Chancery Consolidated General Orders of 1860.
- (20.) The Chancery Orders dated—
 - March 6th, 1860.
 - March 20th, 1860.
 - February 1st, 1861.
 - February 5th, 1861.
 - July 13th, 1861.

Appendix.

January 1st, 1862.

May 16th, 1862.

May 27th, 1865.

May 7th, 1866.

November 22nd, 1866.

April 17th, 1867.

- (21.) The Chancery Regulations dated August 8th, 1857, and March 15th, 1860.
- (22.) The Rules, Orders, and Regulations for the High Court of Admiralty of England, 1859 and 1871.

FORM OF ALLOCATUR OR CERTIFICATE FOR COSTS.

IN THE HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

188 . — No. .
No. of Bill.

Between

and

Plaintiff,

Defendant.

Dated this

day of

188 .

I certify that the costs of the
allowed at £ .

have been taxed and

A Master of the Supreme Court of Judicature.

PART II.

COUNTY COURT SCALE OF COSTS AND CHARGES.—
COUNTY COURT RULES, 1875.

A scale of costs and charges to be paid to Solicitors in actions under £20, as well between party and party as between Solicitor and client, on and after the 2nd of November, 1875.

I.—*In actions where the amount recovered exceeds 40s. and does not exceed £5.*

	<i>s.</i>	<i>d.</i>
1. Instructions for and preparing particulars for an ordinary summons (such particulars to be signed by the solicitor), and attending and entering plaint	3	0
2. Attending or acting in Court (9 & 10 Vict. c. 95, s. 91) ^a	10	0

For a default summons instead of item one.

3. Preparing affidavit, swearing, and filing, including notice of mode in which payment will be accepted	5	0
4. Copy and service of summons, if served by plaintiff's solicitor, or his clerk, within two miles of the place of business of the solicitor	5	0
If beyond that distance, additional for every mile but not to exceed 10 miles	0	6
5. Affidavit of service with copy of summons annexed, attending to file and entering up judgment by default ^a	6	8

II.—*In actions where the amount recovered exceeds £5, and does not exceed £10.*

1. Letter before action	3	4
2. Instructions for and preparing particulars for an ordinary summons, such particulars to be signed by the solicitor, and attending and entering plaint	6	8
3. Attending or acting in Court (9 & 10 Vict. c. 95, s. 91) ^a	15	0

For a default summons instead of item two.

4. Preparing affidavit, swearing, and filing, including notice of mode in which payment will be accepted	6	0
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^a See County Court Rules, 1876, Rule 30.

- | | |
|--|-------|
| 5. Copy and service of summons, if served by plaintiff's solicitor, or his clerk, within two miles of the place of business of the solicitor | s. d. |
| If beyond that distance, additional for every mile, not to exceed 10 miles | 5 0 |
| 6. Affidavit of service with copy of summons annexed, attending to file and entering up judgment by default ^a | 0 6 |
| | 6 8 |

III.—*In actions where the amount recovered exceeds £10 and does not exceed £20.*

- | | |
|---|------|
| 1. Letter before action | 3 4 |
| 2. Instructions for and preparing particulars for an ordinary summons (such particulars to be signed by the solicitor), and attending and entering plaint | 6 8 |
| 3. Attending or acting in Court (9 & 10 Vict. c. 91. s. 91) ^a | 15 0 |
| 4. Taxing costs ^a | 5 0 |

For a default summons instead of item two.

- | | |
|--|-----|
| 5. Preparing, swearing, and filing affidavit, including notice of mode in which payment will be accepted | 6 8 |
| 6. Copy and service of summons, if served by plaintiff's solicitor, or his clerk, within two miles of the place of business of the solicitor | 5 0 |
| If beyond that distance, additional for every mile, but not to exceed 10 miles | 0 6 |
| 7. Affidavit of service with copy of summons annexed, attending to file and entering up judgment by default ^a | 6 8 |

Note.—[The items of charge numbered 1 and 2 and 1, 2, and 3 in the above scales may be charged in the summons in the cases to which the charges respectively apply; where the amount claimed is larger than the amount recovered, the judge may certify for costs on the scale applicable to the amount claimed if he shall think fit.]

^a See County Court Rules, 1876, Rule 30, which provides that "item 2 in part I., and item 3 in part II., and 3 and 4 in part III., and a moiety of any item for affidavit of service with copy of summons annexed, attending to file and entering up judgment by default, in the scale of costs for actions not exceeding £20 shall not be entered on the summons; and where counsel is employed and an amount of not less than five pounds is claimed, one pound three shillings and sixpence may be allowed by the Court in addition to the item for the attendance in Court of a solicitor."

Scale of costs and charges to be paid to Counsel and Solicitors in actions above £20, as well between party and party as between solicitor and client on and after 2nd November, 1875.

	Lower Scale ^a	Higher Scale ^a
	£ s. d.	£ s. d.
1. Letter before action	0 3 6	0 3 6
2. Instructions to sue or defend	0 6 8	0 13 4
3. Application for substituted service or service out of England	0 4 0	0 6 0
Service, sum allowed by judge.		
4. Perusing deeds and documents when long, not exceeding	—	2 2 0
5. Attendance and entering plaint, including particulars and copies, such particulars and copies being signed by the solicitor	0 13 4	0 13 4
6. Where special particulars are required under Order 8, rule 7, then in addition to item 5	0 6 8	0 13 4
7. Preparing affidavit and filing, including notice of mode in which payment will be accepted	0 6 8	0 6 8
8. Copy and service of summons, if served by solicitor, or his clerk, within two miles of the place of business of the solicitor	0 5 0	0 5 0
If beyond that distance, additional for every mile, but not to exceed 10 miles	0 0 6	0 0 6
9. Affidavit of service with copy of summons annexed	0 5 0	0 5 0
10. Attending to file affidavit of service, including entering up judgment by default	0 3 4	0 6 8
N.B.—The total amount of these items where applicable to be entered on the summons.		
11. Attending lodging judge's order, and preparing statement of cause of action or defence, including copies, and lodging same with registrar, if signed by attorney (sections 7 and 10 of "The County Courts Act, 1867")	0 13 4	0 13 4
12. Examining and taking minutes of evidence of each witness afterwards allowed by the judge	0 3 4	0 6 8

^a See note at end of scale, *post* p. 298.

	Lower Scale	Higher Scale
If more than six folios, every additional folio (whether counsel employed or not)	£ s. d.	£ s. d.
13. Drawing brief for counsel, per folio	0 1 0	0 1 0
14. Attending counsel therewith.	0 1 0	0 1 0
15. Fee to counsel and clerk, sum paid not exceeding	0 3 4	0 6 8
16. If conference with counsel allowed, appointing it and attending counsel	3 5 6	5 10 0
17. Fee to counsel and clerk, on conference	0 6 8	0 13 4
18. Attending Court on trial, with counsel	1 6 0	1 6 0
19. Attending Court and conducting cause, where no counsel employed	1 1 0	1 10 0
20. Where judgment is deferred, attending Court to hear it	2 0 0	2 0 0
21. Plans, charts, or models where necessary for use at hearing, by special order on taxation, not exceeding	0 6 8	0 6 8
22. Witnesses' expenses, according to scale in force.	2 2 0	2 2 0
23. Attending taxing costs	2 2 0	2 2 0
24. Letters to be allowed once only in action or matter	0 6 8	0 6 8
25. Serving any notice on a party or his solicitor, including copy thereof	0 5 0	0 5 0
26. If served beyond three miles of registrar's office, reasonable expenses for travelling and maintenance.	0 3 6	0 5 0
OCCASIONAL COSTS.		
27. Transfer, lodging order of	0 10 0	0 16 8
28. Notice to produce, notice to admit, notice of application for a new trial, or to set aside proceedings,—including copies or duplicate originals and service,—and notice of special defence and copies, including particulars, and copies in cases of set-off, and attending registrar of the Court therewith, such notices, particulars, and copies being signed by the solicitor	0 6 8	0 13 4
29. On receipt of notice to produce or admit or to answer interrogatories, perusing same, and advising thereon	0 6 8	0 13 4

	Lower Scale	Higher Scale
	£ s. d.	£ s. d.
30. All applications and motions, or attending Court to answer applications and motions under Order 13	0 6 8	0 6 8
31. Drawing interrogatories and answer thereto under last-mentioned order	0 5 0	0 5 0
If more than five folios, per folio	0 1 0	0 1 0
32. Attending examination under Order 24	0 6 8	0 6 8
33. Attending inspecting documents	0 6 8	0 6 8
34. Mileage, one way, from the solicitor's place of business to place of inspection of documents, for each mile, not exceeding, unless by special order of judge, in the whole 20 miles	0 1 0	0 1 0
35. All necessary affidavits, not exceeding five folios, including filing, each	0 5 0	0 5 0
36. For every additional folio	0 1 0	0 1 0
37. Oath; sum paid.		
38. Attending Court for an order to bring up a prisoner to give evidence	0 4 0	0 4 0
39. Attending Court to support or oppose motion for any application, or where no counsel employed	0 13 4	1 1 0
40. Attending in the last-mentioned cases with counsel	0 10 0	0 13 4
41. Fee to counsel and clerk in such cases sum paid (not exceeding)	1 3 6	2 6 6
42. All necessary applications and motions to the Court not otherwise provided for, including instructions and all attendances	0 6 8	0 13 4
43. Solicitor's travelling expenses to attend Court, one way, not exceeding 20 miles, per mile	0 1 0	0 1 0
44. Where in the opinion of the registrar the solicitor cannot return the same night, in addition to the above mileage	1 11 6	1 11 6
45. Any attendance at the office of the registrar, or any attendance upon the opposite party, which the registrar may, upon taxation, think was necessary	0 3 4	0 6 8
46. All costs for letters, and for searches for certificates of births, marriages, and deaths which the registrar may, upon taxation, think necessary, such sum as the registrar shall deem reasonable.		
47. Fees and copies; (sum paid).		

	Lower Scale			Higher Scale		
	£	s.	d.	£	s.	d.
48. All necessary copies, per folio	0	0	4	0	0	4
49. Preparing admission by Defendant . . .	0	3	4	0	6	8
50. Drawing accounts and other documents not included in the foregoing costs, but allowed upon taxation of costs to be necessary, per folio	0	0	8	0	0	8
51. For perusing and adapting old abstracts of title, per sheet	0	3	4	0	3	4
52. Drawing abstracts of additional deeds and documents per sheet	0	6	8	0	6	8
53. For preparing conditions and contracts of sale, and fair copy, per folio	0	0	8	0	0	8
54. Where condition and contract are not submitted to counsel, in addition to the above there shall be allowed for perusing abstracts, every three sheets	0	3	4	0	3	4
55. Where conditions and contracts are to be settled by counsel, instructions to counsel to accompany abstract, and attendance therewith, or letter	0	6	8	0	13	4
56. Fee to counsel and clerk.						
57. Attending sale	1	1	0	2	2	0
58. Where by any proceeding taken by the opposite party it becomes necessary to advise or receive instruction from a client in the progress of an action or matter, for each attendance	0	6	8	0	13	4
59. Where in the course of an action or matter a party suing or sued in a fiduciary or representative character necessarily incurs costs not allowed upon taxation between party and party, the registrar shall apply to the judge to allow such sums as he may think fit out of any funds in Court applicable to that purpose.						
CASE.						
<i>Sections 11 or 12 of the County Courts Act, 1867.</i>						
60. Drawing case, per folio	—			0	1	0
61. Perusing and settling case prepared by the other party in action, per folio	—			0	0	6
62. Drawing briefs for counsel to argue case	—			1	1	0
63. Attending counsel with brief	—			0	3	4

	Lower Scale	Higher Scale
64. Fee to counsel upon brief, sum paid not exceeding	£ s. d. —	£ s. d. 3 5 6
65. Attending Court when counsel employed	—	1 1 0
66. Attending Court when counsel not employed.	—	0 15 0
COSTS OF THE DAY ON ADJOURNMENT OF CAUSE.		
67. Solicitor for attending Court where no counsel employed	0 15 0	0 15 0
68. Attending with counsel	0 10 0	0 13 4
69. Refresher fee to counsel and clerk	1 3 6	1 3 6
70. Witnesses' expenses, same as on trial.		
ARBITRATION.		
71. Attending reference, without counsel, for each sitting	1 0 0	1 0 0
72. Attending reference, with counsel, for each sitting	0 15 0	0 15 0
73. Where sitting exceeds four hours, for every additional hour	0 6 8	0 6 8
74. Fee to counsel and clerk, for each sitting, sum paid, not exceeding	2 4 6	2 4 6
75. Witnesses' expenses, same as on trial.		
<i>Note.</i> —Cost of counsel and solicitor, or of a solicitor on attending reference, shall not be allowed without the order of the judge; nor shall the costs of more than one sitting be allowed without the order of the judge.		
NEW TRIAL.		
76. Costs to be allowed on the same scale as on the original trial.		
COSTS ON APPEALS.		
77. Preparing notice of appeal, including copies and service	0 5 0	0 10 0
78. Paying money into Court as deposit on appeal, including notice and service thereof	0 3 0	0 3 0
79. Notice of nature and particulars of proposed security, including copies and service	0 5 0	0 5 0
80. Preparing case, including copies	0 10 0	1 1 0
81. Attending judge to sign, or to settle and sign	0 6 8	0 6 8

	Lower Scale	Higher Scale
82. Transmitting and depositing copies of case to party, and with registrar	£ s. d. 0 5 0	£ s. d. 0 5 0
83. Transmitting case and copies to Court of Appeal, including notice thereof to successful party	0 7 0	0 7 0
84. Application to judge for leave to proceed on the judgment	0 5 0	0 7 0
85. Depositing order of Court of Appeal, including notice and service thereof	0 3 4	0 6 8
ORDER X.—COUNTER OR OTHER CLAIM.		
Any additional costs occasioned by a counter or other claim shall be taxed, and may be allowed as if such claim had been made by a separate action, except that no item shall be allowed for any charge which has been allowed in respect of the original action or the defence thereto.		

The registrar is to tax the bills of costs of defendants upon the lower scale when the subject matter does not exceed £100, and upon the higher when it exceeds £100, or the action is brought under either section 11 or 12 of the County Courts Act, 1867; and the bills of costs of plaintiffs upon the lower scale when the sum recovered or the subject matter does not exceed £100, and upon the higher when the sum recovered or the subject matter exceeds £100, or the action is brought under either section 11 or 12 of the County Courts Act, 1867, unless in either case the judge shall otherwise order.

Costs in actions under the County Courts Act, 1856, s. 23, shall be taxed according to the scale of taxation used in the High Court of Justice, so far as it is directly applicable; and where it is not so applicable, the principle of that scale shall be followed.

As to special allowances of costs, see Order 36 of the County Court Rules, 1875.

ALLOWANCES TO WITNESSES UNDER THE COUNTY COURT
RULES, 1875.

	£ s. d.	£ s. d.
Gentlemen, merchants, bankers, and professional men, per diem . . . from	0 15 0	to 1 1 0

Tradesmen, auctioneers, accountants,	£	s.	d.		£	s.	d.
clerks, and yeomen, per diem . from	0	7	6	to	0	15	0
Artisans and journeymen, per diem from	0	4	0	to	0	7	6
Labourers, and the like, per diem . from	0	3	0	to	0	4	0

Travelling expenses, sum reasonably paid, but not more than sixpence per mile, one way.

If the witnesses attend in more than one cause they will be entitled to a proportionate part in each cause only.

ALLOWANCE TO WITNESSES.^a

	If resident in the town in which the cause is tried.			If resident at a distance from the place of trial.		
	£	s.	d.	£	s.	d.
Common witnesses, such as labourers, journeymen, &c., per diem	0	5	0	0	5	0
				to		
				0	7	6
Master tradesmen, yeomen, and farmers, per diem	0	7	6	0	10	0
		to		to		
	0	10	0	0	15	0
	0	10	6	0	10	6
Auctioneers and accountants, per diem		to		to		
	1	1	0	1	1	0
Professional men, per diem	1	1	0	—		
Ditto, inclusive of all, except travelling expenses, per diem	—			2	2	0
				to		
				3	3	0
				0	15	0
Attorney's or other clerks, per diem	0	10	6	to		
				1	1	0
				1	1	0
Engineers and surveyors, per diem	1	1	0	to		
				3	3	0
Notaries, per diem	1	1	0	1	1	0
	1	1	0			
Gentlemen	with subpoena, but no daily allowance, except after the first day, and then a reasonable sum for refreshment and conveyance.			1		
Esquires						
Bankers						
Merchants						
				per Diem.		

^a See Directions to the Masters of the Courts ; Hil. Term, 1853.

	If resident in the town in which the cause is tried.	If resident at a distance from the place of trial.
	£ s. d.	£ s. d.
Females, according to station in life, per diem { from	0 5 0 to 0 10 0	0 5 0 to 1 0 0
Police inspector, per diem	0 5 0	0 7 6 to 0 10 0
Police constable	0 3 0	0 5 0 to 0 7 6
If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each case only.		
The travelling expenses of witnesses shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed 1s. per mile one way.		

MISCELLANEOUS.

Close copy of proceedings in agency cases, 4d. per folio, according to actual length.

In cases under £20, no allowance will be made in respect of the following matters :—

Attending deponent to be sworn to Affidavit.

Advice on evidence.

Maps, plans, or models.

For maps or plans, when used in cases above £20, from £1 1s. to £3 3s.^a

THE PRACTICE MASTERS' RULES.^b

Lower scale certificates and certificates of costs are to be sent to the general filing department when more than a year old.

^a This scale of allowances is given merely by way of illustration to show what allowances were made to witnesses prior to the Rules of the Supreme Court, 1883.

^b The following rules which were settled by the Practice Masters prior to the Rules of the Supreme Court, 1883, are not of binding authority, but merely regulate the practice of the office. Those rules only have been selected which seem to bear upon the practice relating to certificates of costs, judgments and fees.

Parties are not to be allowed to see the cause book unless by express leave obtained from a master or an order by a judge.

All searches in the cause book for writs of summons, or otherwise, are to be made by the clerks in the Central Office, and the result communicated to the party applying.

When a certificate is given, and no inspection of a præcipe is required, only one fee of 1s. is to be taken (or 4s. if higher scale).

Copies of writs of summons should be signed with the name of the solicitor or solicitor's clerk suing them out as under :—

C. D. and Co.
or A. B.
for C. D. and Co.

The stamp is to be on the copy writ filed.

If a solicitor has caused an appearance to be entered by mistake, the mistake may be rectified with the consent in writing of the solicitor for the plaintiffs, and on the fiat (on the production of such consent) of a practice master, to be given on a præcipe with a 2s. 6d. (search) stamp.

Subpœnas remain in force only till the end of the sitting or assize for which they were issued. A new writ must afterwards be issued, or the former writ may be (at the option of the parties) altered as to date and sitting or assize, and re-issued as a new writ

The date of return in the writ and præcipe may, before service, be amended, without the direction of a master, and without fee, provided the amended date be within the sitting or assize for which the subpœna was issued.

[No pleadings and documents filed in default] will (for the present) be delivered out without an order, but any defendant against whom documents have been filed may, after appearance, inspect the same without fee.

As to County Court certificate of result of trial no fee to be charged for search.

When judgment is signed under Order 41, rules 4 and 5* on any order certificate or other document, such document shall be filed.

Original stamped judgment to be filed, and office copy to be delivered out at 6d. a folio. The judgment need not be signed by the solicitor entering it.

If judgment removed from Lord Mayor's Court, the fixed cost of removal to be one guinea in all cases.

An allocatur for costs is to be placed on a certificate in the form settled.

* Now Order 41, rules 7 and 8.

In cases where the plaintiff is entitled to a final judgment as to part of his claim, and to an interlocutory judgment as to the remainder, *one* judgment only is necessary, final as to part and interlocutory as to the rest, and *one fee paid*.

In the case of cross judgments in the same action, where, after a trial there is a direction for judgment for plaintiff against some of the defendants, and for some of the defendants against the plaintiff, and also for some of the defendants against the others, the whole direction may be embodied in one judgment, and the different parties may take office copies for use.

Date of filing of pleadings filed on entering judgment and of certificates of costs are to be entered in cause books and on the documents.

[As to Costs on Judgments for default of Appearance.]

	£	s.	d.
In town cases	3	14	0
In country and agency cases, and cases in which service effected beyond five miles from General Post Office, St. Martin's-le-Grand	4	6	0
And 6s. in addition for each service beyond one defendant.			
The above allowances include all mileage.			

[As to the Costs of removing Judgments from Inferior Courts for purposes of execution.]

The order should direct that the party removing the judgment have his costs of and relating to the removal (to be taxed).

[Memorandum of Appearance.^a]

When a memorandum of appearance by a defendant is handed in without a previous search for judgment (for which search the proper fee should be taken), and it is afterwards found that judgment has been already signed, the appearance must not be entered in the cause book, and the stamp on the memorandum of appearance must be retained as a used stamp, and not treated as fit for allowance. The duplicate is not to be sealed, but the party who has handed in the memorandum, if he desires to know, at the time, whether judgment has been already signed, may be so informed without further payment. A note should in such cases be made in the cause book that a memorandum of appearance was brought in after judgment signed, and the fee should be accounted for amongst the appearance fees.

AFFIDAVITS.^b

No affidavit will be allowed to be read or referred to before the Judge or Master in Chambers unless the filing stamp has been affixed and cancelled by the proper officer (in chambers) prior to the parties going into the Judge's room.

^a Dated 10th May, 1882.

^b See Weekly Notes, 5th March, 1881.

PART III.

TABLE OF FEES PAYABLE TO SHERIFFS, UNDER
SHERIFFS, &c.

(Made pursuant to 7 Will. 4 & 1 Vict. c. 55.)

For every warrant which shall be granted by the sheriff to his officer,
upon any writ or process :—

	£	s.	d.
In London or Middlesex	0	2	6
And on Crown and outlawry process, an additional	0	2	6
In all other counties, where the most distant part of the county shall not exceed 100 miles from London	0	5	0
Not exceeding 200 miles	0	6	0
Exceeding 200 miles	0	7	0
Where there are several defendants in a writ of capias, and warrants are issued thereon by the under-sheriff against more than one defendant, no more shall be charged in any case for each warrant after the first than	0	2	6
For an arrest in London	0	10	6
In Middlesex, not exceeding a mile from the General Post Office	0	10	6
Not exceeding seven miles from the same place	1	1	0
In other counties, not exceeding a mile from the officer's residence	0	10	6
Not exceeding seven miles	1	1	0
Exceeding seven miles	1	11	6
For conveying the defendant to gaol from the place of arrest per mile	0	1	0
For an undertaking to give a bail bond	0	10	6

FOR A BAIL BOND.

If the debt do not exceed £50	0	10	6
" " 100	1	1	0
" " 150	1	11	6
" " 300	2	2	0
" " 400	3	3	0
" " 500	4	4	0
If it shall exceed £500	5	5	0

	£	s.	d.
For receiving money under the statute upon deposit for arrest, and paying the same into Court if in London or Middlesex	0	6	8
If in any other county	0	10	0

FOR FILING THE BAIL BOND.

If the arrest be made in London or Middlesex	0	2	
If in any other county	0	4	

ASSIGNMENT OF BAIL OR OTHER BOND.

If in London or Middlesex	0	5	
If in any other county, including postage	0	7	
For the return to any writ of <i>habeas corpus</i> , if one action	0	12	
For each action after the first	0	2	
For the bailiff to conduct prisoner to gaol, . per diem	0	10	
And travelling expenses per mile	0	1	
For searching offices for detainers	0	1	
Bailiff's messenger for that purpose	0	2	
To the bailiff for executing warrants on extent, <i>capias</i> <i>utlagatum</i> , <i>levari facias</i> , <i>fieri facias</i> , <i>ca sa, ne exeat</i> , attachment <i>elegit</i> , writ of possession, forfeited recognizance, and other like matters, for each, if the distance from the sheriff's office or the bailiff's residence do not exceed five miles	1	1	
If beyond that distance per mile	0	0	
On distringas in London	0	5	
In Middlesex, not exceeding five miles from General Post Office	0	5	
Exceeding five miles	0	10	
In other counties, not exceeding five miles from officer's residence	0	5	
Exceeding five miles	0	10	
For each man left in possession when absolutely necessary.			
If boarded per diem	0	3	
If not boarded per diem	0	5	
For every sale by auction, notwithstanding the defendant should become bankrupt or insolvent, where the property sold does not produce more than £300, 5 per cent. ; £400, 4 per cent. ; £500, 3 per cent. ; and where it exceeds £500, 2½ per cent.			
Bond of indemnity besides stamps	1	10	0
Certificate of execution having issued for record	0	5	0

ON WRITS OF INQUIRY.

For a deputation	1	1	0
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On lodging a writ for entering cause, and warrant for summoning jury, which fee shall be forfeited in case of countermand of trial	£	s.	d.
	0	4	0

ON INQUISITION.

Sheriff for presiding	1	1	0
Bailiff for summoning jury and attendance in Court	0	4	0
And if not held at the office of the under-sheriff, for hire of room, if actually paid, not exceeding	0	10	0
For travelling expenses of under-sheriff from his office to place where trial or inquisition held . . . per mile	0	1	0
To the bailiff from his residence per mile	0	0	6
The travelling expenses of the under-sheriff from his office, and of the bailiff from his residence, to the place where the trial or inquisition is held, are to be apportioned rateably to the parties, if more than one trial or inquisition be held at the same time and place.			
In all cases where it shall appear to the master that a saving of expense has accrued to the parties by reason of a writ of trial having been executed by deputation, the fee for such deputation shall be allowed.*			
On writs of extent, elegit, capias utlagatum and others of the like nature; for summoning the jury, use of room, presiding at inquisition	2	2	0
Jury	0	12	0
For travelling expenses of the under-sheriff from his office to the place of inquisition per mile	0	1	0
For drawing and ingrossing the inquisition . . . per folio	0	1	6
For a summons for the attendance of a witness	0	5	0

ATTENDANCES.

For attendance of sheriff in Court upon the trial of every common jury cause or trial, from the party entering the cause for trial	0	10	6
For attending in Court on the trial of every cause or issue tried by a special jury summoned by precept under sect. 108 of the Common Law Procedure Act, 1852, from the party at whose instance the same is tried (Reg. Gen. T. T. 1864)	1	1	0
In scire facias, &c.—Return of writs.			
For each summons on a writ of sci. fa., or for the service of writ of capias, where no arrest	0	5	0
And mileage per mile	0	1	0
For recording each demand or proclamation under writs of outlawry	0	2	0
For bailiff for making each demand or proclamation on writs of outlawry; in London and Middlesex	0	2	6

* Writs of trial have been abolished.

	£	s.	d.
In other counties	0	5	0
And travelling expenses if the distance shall exceed five miles, then for every mile beyond that distance	0	0	6
For fees on attending a view provided by Reg. Gen. H. T. 1853, . 49. See <i>ante</i> pp. 154-155.			

ORDERS FOR TAKING FEES BY STAMPS.

Order as to taking of the fees and percentages in the Supreme Court of Judicature by stamps except in the District Registries.

[28th October, 1875.]

Whereas by Section 26 of the Supreme Court of Judicature Act, 1875, it is provided that the fees and percentages appointed to be taken in the High Court of Justice, and in the Court of Appeal, and in any Court to be created by any Commission, and in any office which is connected with any of those Courts or in which any business connected with any of those Courts is conducted, shall, except so far as they be otherwise directed, be taken by means of stamps; and further, that such stamps shall be impressed or adhesive, as the Treasury may from time to time direct; and that the Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of such stamps.

Now we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do, with the concurrence of the Lord Chancellor, hereby give notice and order and direct—

1. That from and after the 1st November next, being the date fixed for the commencement of this Act, all orders and regulations now in force with respect to the use, proper cancellation, mode of keeping accounts, and allowance of fee stamps in

The Court of Chancery,
The several Common Law Courts,
The Court of Probate,
The Court for Divorce and Matrimonial causes,
The Admiralty Court,

or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in Bankruptcy matters, shall continue in force until they shall respectively be altered or annulled by rules hereafter to be made and published in conformity with the Act.

2. That the stamps to be used in the collection of fees and percentages payable under the Order made in pursuance of the powers given by the Supreme Court of Judicature Act, 1875, bearing date this

day, shall until further notice be either impressed or adhesive as directed in any previous Order; and in cases to which no previous order is applicable, shall be either impressed or adhesive, at the option of the parties by whom the fees are payable.

3. That until we do order to the contrary, the dies heretofore in use for impressing stamps in any of the Courts affected by the said Act, and also the adhesive stamps heretofore in use, shall be available and valid for the taking of the said fees and percentages, and may be used notwithstanding that new dies and stamps appropriated to the Supreme Court of Judicature may in the meantime have been issued by the Commissioners of Inland Revenue, which will also be valid and available.

4. That for such documents in the Chancery, the Queen's Bench, the Common Pleas, and the Exchequer Divisions of the Supreme Court of Judicature as may be, under any existing Rule or Order, stamped with an adhesive stamp or stamps, adhesive stamps appropriated by the words "Judicature Fees" shall be used; provided always that up to the beginning of the sittings to take place after January next, the adhesive stamps hitherto used in the Courts of Chancery and Common Law shall be available and may be used for such documents in the Supreme Court of Judicature.

5. And that where any of such fees are payable in respect of any matter or thing to be done by any officer or in any office whatever of the Supreme Court of Judicature, and it shall not have been customary or may not be necessary to use any written or printed document or paper in reference to such matter or thing whereon the stamp could be stamped or affixed, the party or his solicitor requiring such matter or thing to be done, shall make application for the same by a *præcipe*, or short note in writing or print, and a stamp denoting the amount of the fees so payable shall be stamped or affixed to such *præcipe* or note.

6. That where a fee is payable, but no directions are found in previous Orders as to the document to which the stamp is to be applied, it shall be lawful, until we do otherwise order, for any officer of the Supreme Court whose duty it would be to see that the fee in question is duly paid by means of a stamp, to decide on what document such stamp shall be impressed or affixed.

Order as to the Fees and Percentages which are required to be taken in the Supreme Court of Judicature by means of stamps.

[22nd April, 1876.]

Whereas by section 26 of the Supreme Court of Judicature Act, 1875, it is provided that the fees and percentages appointed to be taken in the High Court of Justice and in the Court of Appeal, and in any Court to be created by any Commission, and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, shall, except so far as they be otherwise directed, be taken by means of stamps; and further, that such stamps shall be impressed or adhesive, as the Treasury may

from time to time direct ; and that the Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of such stamps, and for keeping accounts of such stamps.

And whereas by an Order made under the same section of the said Act on the 28th day of October, 1875, it was (amongst other things) provided that the stamps to be used in the collection of the fees and percentages therein mentioned should, until further notice, be either impressed or adhesive as directed in any previous Order, and in cases to which no previous Order was applicable should be either impressed or adhesive, at the option of the parties by whom the fees were payable ; and it was also provided that up to the beginning of the sittings on the 25th day of April, 1876, the adhesive stamps used before the publication of the said Order in the Courts of Chancery and Common Law should be available, and might be used, in the Supreme Court of Judicature.

And whereas it is expedient to further extend the use of the same stamps, and to make other provisions in lieu of, and in addition to, those contained in the said Order of the 28th day of October, 1875.

Now, we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do, with the concurrence of the Lord Chancellor, hereby give notice, and order and direct :—

1. That from and after the 25th day of April, 1876, the stamps used for denoting the said fees and percentages shall be of the character, and be applied and otherwise dealt with, as prescribed by the schedule hereto.
2. That the adhesive stamps at present in use in the Supreme Court of Judicature shall continue to be used so long as they are supplied by the Commissioners of Inland Revenue.
3. That in any case in which a deposit on account of probable fees and expenses is required, the following regulations shall be observed :—

AS TO DEPOSITS.

- (a.) The party, or his solicitor, from whom under any Order as to Court fees a deposit may be required, shall, before the matter or cause be proceeded with, present for the signature of the officer of the Court requiring the deposit, a certificate, duly stamped, for the amount of such deposit. Forms of certificates provided by the Commissioners of Inland Revenue may be obtained at the Inland Revenue Office, Somerset House, or at such other places as the Commissioners may appoint.
- (b.) When the fees and expenses are ascertained, the said Officer of the Court shall endorse upon the said certificate the amount thereof.

- (c.) If the amount is in excess of the deposit, the certificate, bearing an additional stamp equal to the excess, must be produced to the said Officer before he delivers his judgment or award, or gives his decision in the matter or cause.
- (d.) If the amount of the fees and expenses is less than the deposit, the holder of the certificate may obtain repayment of the difference upon presenting the certificate so endorsed at the Inland Revenue Office, Somerset House.

The SCHEDULE above referred to.*

SUMMONSES, WRITS, COMMISSIONS, AND WARRANTS.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On sealing a writ of summons for commencement of an action.	Writ of summons.	Impressed or adhesive.	{ Forms of writ with the impressed stamp will be sold at the Inland Revenue Office, and by law stationers.
On sealing a concurrent, renewed, or amended writ of summons for commencement of an action.			
On sealing a notice for service under Order 16, rule 18. ^b	Notice.	Impressed or adhesive.	Forms with the impressed stamp will be sold at the Inland Revenue Office and by law stationers.
On sealing a writ of mandamus or injunction.	Præcipe left at time of issuing writ.	Impressed.	{ Præcipes with the impressed stamp will be sold at the Inland Revenue Office and by law stationers.
On sealing a writ of subpoena not exceeding three persons.			
On sealing every other writ.			
On sealing a summons to originate proceedings in the Chancery Division.	Summons.	Impressed.	A form of summons will be sold at the Inland Revenue Office and by law stationers.

* See also amending order, July 12, 1881, *post* p. 319.

^b Now Order 16, r. 49.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On sealing a duplicate thereof.	Duplicate summons.	Impressed.	Forms of commission with the impressed stamp will be sold at the Inland Revenue Office. (The commission or the copy of petition to be written on impressed paper, or the document to be produced at the Inland Revenue to be stamped.
On sealing a copy of same for service.	Copy of summons.	Impressed or adhesive.	
On sealing or issuing any other summons or warrant.	Summons.	Impressed or adhesive.	
On sealing or issuing a commission to take oaths or affidavits in the Supreme Court.	Commission.	Impressed.	
Every other commission.	Commission.	Impressed.	
On marking a copy of a petition of right for service.	Copy of petition.	Impressed.	

APPEARANCES.

The fee payable on entering an appearance to be denoted by an impressed stamp on the form of memorandum as prescribed by the Appendix to the Supreme Court of Judicature Act, 1875, and where the appearance of more than one person is entered by the same memorandum, the fees for all persons beyond the first to be denoted by means of impressed or adhesive stamps.

Forms of memorandum of appearance with the impressed stamp for one or more defendants will be sold at the Inland Revenue Office and by law stationers.

COPIES.

—	Document to be Stamped.	Character of Stamp to be used.
For a copy of a written deposition of a witness to enable a party to print the same.	Copy.	Impressed or adhesive.

—	Document to be Stamped.	Character of Stamp to be used.
For examining a written or printed copy, and marking same as an office copy.	Copy.	Impressed or adhesive.
For making a copy, and marking same as an office copy.	Copy.	Impressed or adhesive.
For a copy in a foreign language.	Copy.	Impressed or adhesive.
For a copy of a plan, map, section, drawing, photograph, or diagram.	Præcipe or copy.	Impressed or adhesive.
For a printed copy of an order, not being an office or certified copy.	Copy.	Impressed or adhesive.

ATTENDANCES.

The fees payable under this heading to be denoted either by an impressed or adhesive stamp on the subpoena, notice, or other document requiring the attendance of the officer.

If the officer's attendance be required beyond one day, the additional fee per diem after the first to be taken by means of a præcipe with the impressed stamp, filed in the department from which the officer is summoned.

OATHS, &c.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster - General on which no fee is payable.	Affidavit or other document answering thereto.	Impressed or adhesive.	

OATHS, &C.

—	Document to be Stamped, and Character of Stamp to be used.	Regulations & Observation
And in addition thereto, for each exhibit therein referred to and required to be marked.	Stamp to be impressed or adhesive on exhibit if practicable, but if not, to be impressed on præcipe filed.	

FILING.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On filing a special case or petition of right.	Special case, petition of right, or præcipe.	Impressed.	Where practicable stamp to be special case or petition of right, & in other cases præcipe filed.
On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, warrant of attorney, cognovit, bail satisfaction piece, and writ of execution with return.	Document filed.	Impressed or adhesive.	
On filing a scheme pursuant to the statute 30 & 31 Vict. c. 127, or the Liquidation Act, 1868.	Scheme.	Impressed.	
On filing a caveat.	Caveat.	Impressed.	

CERTIFICATES.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For a certificate of appearance, or of a pleading, affidavit, proceeding having been entered, filed, or taken, or of the negative thereof.	Certificate.	Impressed or adhesive.	Forms of certificate with the impressed stamp will be sold at the Inland Revenue Office and by law stationers.

SEARCHES AND INSPECTIONS.

The fees on searches and inspections to be taken by means of impressed stamps on a form which will be issued at the Inland Revenue Office, and sold there, and by law stationers.

EXAMINATION OF WITNESSES.

The fees under this heading may still be denoted by means of adhesive stamps, which may be affixed either to the deposition or to the order or application paper for examination.

HEARING.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For entering or setting down, or re-entering or re-setting down, an appeal to the Court of Appeal, or a cause for trial or hearing in any Court in London or Middlesex, or at any Assizes, including a demurrer, special case, and petition of right, but not any other petition, nor a summons adjourned from Chambers.	In the Registry Office, Chancery Division, on forms provided for the purpose.	Impressed.	Forms with the impressed stamp will be sold at the Inland Revenue, and at the Registrar's Office, Chancery Division.
	At offices of Associates on copy of pleadings.	Impressed or adhesive.	
	At all other offices of the High Court or Court of Appeal on præcipe,	Impressed	

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For certificate of an Associate of the result of trial.	Certificate.	Impressed or adhesive.	

JUDGMENTS, DECREES, AND ORDERS.

—	Document to be stamped.	Character of stamp to be used.	Regulations and Observations.
For drawing up and entering a judgment, or decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by commons at Chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal.	Judgment or order.	Stamp to be impressed or adhesive on the judgment or order, except at the Crown Office, where, as far as practicable, a præcipe, with the impressed stamp should be used.	
For drawing up and entering any other order, whether made in Court or at Chambers.	Order.	Impressed or adhesive.	
For copy of a plan, map, section, drawing, photograph, or diagram required to accompany any order.	Copy.	Impressed or adhesive.	Where an adhesive stamp would damage the copy præcipe with the impressed stamp should be used.

TAKING ACCOUNTS.

The fees payable under this heading when taken on the accounts to be denoted by means of adhesive stamps affixed to the accounts or by impressed stamps on paper to be left at the office, but when taken on a certificate they may be denoted either by impressed or adhesive stamps.

TAXATION OF COSTS.

—	Document to be stamped.	Character of stamp to be used.	Regulations and Observations.
For taxing a bill of costs.	Stamp to be adhesive on bill of costs, but where a certificate, allocatur, or præcipe is used, the fee to be denoted by impressed stamps.		
For a certificate or allocatur of the result, not being a judgment.	Certificate or allocatur.	Impressed.	

PETITIONS.

—	Document to be stamped.	Character of Stamp to be used.	Regulations and Observations.
For answering a petition for hearing in Court, and setting down.	Petition.	Impressed or adhesive.	
For answering a non-attendable petition, not being a petition for an order of course.	Petition.	Impressed or adhesive.	
On a matter of course order on a petition of right.	Order.	Impressed or adhesive.	
On an order for a commission on a petition of right.	Order.	Impressed.	

REGISTER OF JUDGMENTS AND LIS PENDENS.

—	Document to be stamped.	Character of stamp to be used.	Regulations and Observations.
For registering a judgment or lis pendens. For re-registering same. For a search.	Memorandum of registry. General form of search præcipe.	Impressed.	Forms with the pressed stamp be sold at the of the registry judgments.
For a certificate of entry of satisfaction.	Certificate.		
For a certificate of a judgment for registration in Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit. On filing for registration a certificate issued out of Courts of Dublin or Court of Session in Scotland under the same Act. On every certificate of the entry of a satisfaction under the same Act.	Certificate.	Impressed or adhesive.	
For a search made in one or both of the registers of Irish and Scotch judgments.	Præcipe.	Impressed.	Forms of Præcipe with the impressed stamp, will be at the Inland venue Office, and law stationers.

MISCELLANEOUS.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On a report of a Private Bill in Parliament.	Report.	Impressed.	
On an allowance of bye-laws or table of fees.	Allowance.	Impressed.	
On a fiat of a Judge.	Fiat.	Impressed or adhesive.	
On signing an advertisement.	Advertisement.	Impressed.	
Upon a reference to a Master of the Queen's Bench Division, for the purpose of any investigation or inquiry other than the taking of an account for which another fee is herein provided.	Certificate or other document used in giving the decision.	Impressed or adhesive.	
On taking acknowledgment of a deed by a married woman.	Acknowledgment.	Impressed.	Forms with the impressed stamp will be sold at the Inland Revenue Office.
On taking a recognizance or bond.	Recognizance.	Impressed or adhesive.	
On taking bail, and taking same off the file and delivering.	Bail piece.	Impressed or adhesive.	

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On a commitment.	Commitment.	} Impressed or adhesive.	Forms of admission with the impressed stamp will be at the Inland Revenue Office.
On an application to produce Judges' notes.	Application.		
On appointment of Commissioners under glebe exchange.	Appointment.	Impressed.	
On examining and signing inrolments of decrees and orders.	Inrolment.	Impressed or adhesive.	
On admission or re-admission of a solicitor.	Admission.	Impressed.	
On a written request for information at the Chancery Pay Office.	Præcipe.	} Impressed.	
For preparing a power of attorney at the Chancery Pay Office.	Power.		
For transcript of an account in the books at the Chancery Pay Office.	Transcript.	Impressed or adhesive.	
Any other proceeding, pleading, or document not hereinbefore specified.	Document or Præcipe.	Impressed or adhesive.		These are to be pressed, if practicable, where not in the office.

GENERAL DIRECTIONS.

In any case in which the use of impressed stamps is prescribed on paper or parchment on which the document requiring a stamp is written may be stamped at the Inland Revenue Office, notwithstanding that stamped forms are also provided by the Commissioners of Inland Revenue.

The cancellation shall be effected in such manner as the Commissioners of Inland Revenue shall from time to time direct.

AMENDING ORDER AS TO THE FEES AND PERCENTAGES WHICH ARE
REQUIRED TO BE TAKEN IN THE SUPREME COURT OF JUDICA-
TURE BY MEANS OF STAMPS. [12th July, 1881.]

Whereas by section 26 of the Supreme Court of Judicature Act, 1875, it is provided that the fees and percentages appointed to be taken in the High Court of Justice and in the Court of Appeal, and in any Court to be created by any Commission, and in any office which is connected with any of those Courts, or which any business connected with any of those Courts is conducted in, shall, except so far as may be otherwise directed, be taken by means of stamps; and further that such stamps shall be impressed or adhesive, as the Treasury may from time to time direct; and that the Treasury, with the concurrence of the Lord Chancellor, may from time to time make such rules as may seem fit for publishing the amount of the fees, and regulating the use of such stamps, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps and for ensuring the proper cancellation of such stamps, and for keeping accounts of such stamps.

And whereas by an Order made under the same section of the said Act on the 22nd April, 1876, it was provided that the stamps to be used in the collection of certain of the fees therein mentioned should be either impressed or adhesive.

And whereas it is expedient to extend the use of impressed stamps and to make the use of them obligatory in the collection of certain fees.

Now, we, the undersigned, being two of the Lords of Her Majesty's Treasury, do with the concurrence of the Lord Chancellor hereby give notice and order and direct:—

1. That from and after the 1st day of August, 1881, the stamps used for denoting the fees as described in the schedule hereto subjoined, shall, in so far as they are payable at the Royal Courts of Justice, be of the character, and be applied and otherwise dealt with as prescribed by such schedule.

THE SCHEDULE above referred to.

SUMMONSES AND WRITS.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On sealing a writ of summons for the commencement of an action.	Writ of summons.	Impressed only.	Forms with the impressed stamp are sold at the Inland Revenue Office, Royal Courts of Justice.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On sealing a concurrent, renewed, or amended writ of summons for the commencement of an action.	Præcipe.	Impressed only.	Præcipes with the impressed stamp are sold at the Inland Revenue Office, Royal Courts of Justice.

APPEARANCES.

The fee or fees payable on entering an appearance to be denoted by an impressed stamp or stamps on the form of memorandum, as prescribed by the Appendix to the Rules of the Supreme Court, April, 1880.

Forms of memorandum of appearance, with the impressed stamp for one or more defendants, are sold at the Inland Revenue Office, Royal Courts of Justice.

JUDGMENTS, DECREES, OR ORDERS.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For drawing up and entering a judgment or decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at Chambers and an order on the hearing of a special case or petition, and any order by the Court of Appeal.	Judgment or order.	Stamp to be impressed on the judgment or order except at the Crown Office, where adhesive stamps may for the present be also admitted, but as far as practicable a præcipe, with an impressed stamp should in all cases be used.	

PETITIONS.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
For answering a petition for hearing in Court and setting down.	Petition.	Impressed only.	
For answering a non-attendable petition not being a petition for an order of course.	Petition.		
On a matter of course order on a petition of right.	Order.		
On an order for a commission on a petition of right.	Order.		

MISCELLANEOUS.

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On a fiat of a Judge.	Fiat.	Impressed only.	
Upon a reference to a Master of the Supreme Court of Judicature for the purpose of an investigation or enquiry other than the taking of an account for which another fee is provided.	Certificate or other document used in giving the decision.		
On taking a recognizance or bond.	Recognizance.		
On taking bail and taking same off file and delivering.	Bail piece.		
On a commitment.	Commitment.		

—	Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
On an application to produce Judge's notes.	Applica- tion.	Impressed only.	
For transcript of an account in the books at the Chancery Pay Office, for each opening.	Trans- cript.		

We further order that, on and after the 2nd day of November, 1881, it shall, for the due protection of the Revenue, be obligatory on all Court Officials charged with the duty of cancelling adhesive stamps, to see that all such stamps, although obliterated by a written or printed cancellation, be afterwards cancelled by means of perforation.

Signature of two of the Lords of the Treasury,

CHARLES C. COTES,
ARTHUR D. HAYTER.

I concur in this Order,

SELBORNE, C.

APPENDIX IV.

ORDER AS TO SUPREME COURT FEES, 1884.

[January 19, 1884.]

The Right Honourable Roundell, Earl of Selborne, Lord High Chancellor of Great Britain, by and with the advice and consent of the undersigned Judges of the Supreme Court, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, doth hereby in pursuance and execution of the powers given by the Supreme Court of Judicature Act, 1875, and all other powers and authorities enabling him in this behalf, order and direct in manner following:—

I. The fees and per-centages contained in the schedule hereto are fixed and appointed to be, and shall be taken in the High Court of Justice, and in the Court of Appeal, and in any court to be created by any commission, and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, and by any officer paid wholly or partly out of public moneys who is attached to any of those Courts, or the Supreme Court or any Judge of those Courts, or any of them. And the said fees and per-centages shall until otherwise determined by the Treasury be taken by stamps, in the same manner as heretofore, except those taken in the District Registries, which shall, until otherwise determined by the Treasury, be taken as the fees and per-centages are now taken.

II. The provisions in this Order shall not apply to or affect any of the matters following (that is to say):—

The existing fees and per-centages in respect of any of the jurisdictions which are not, by the Supreme Court of Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or the Court of Appeal;

The existing fees and per-centages in respect of any matters within the jurisdiction of the Court of Probate at the time of the passing of the Supreme Court of Judicature Act, 1875, other than Probate Actions, or in respect of any appeal in Bankruptcy;

The existing fees and per-centages in respect of any criminal proceedings, other than such proceedings on the Crown side of the Queen's Bench Division as the scale contained in the schedule hereto may be applicable to;

The existing fees and per-centages in respect of matters on the Revenue side of the Queen's Bench Division and proceed-

- ings, and business in the office of the Queen's Remembrancer other than such matters, proceedings, and business as the scale contained in the schedule hereto may be applicable to;
- The existing fees and percentages authorised to be taken by a sheriff, under sheriff, deputy sheriff, bailiff, or other officer or minister of a sheriff;
- The existing fees and per-centages directed to be taken or paid by any Act of Parliament, and in respect of which no fee or per-centage is hereby provided;
- The existing fees and per-centages which shall have become due or payable before this Order comes into operation.

III. Save as otherwise provided by this Order all existing fees and per-centages which may be taken in any of the Courts whose jurisdiction is, by the Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or Court of Appeal, or in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, or by any officer paid wholly or partly out of public moneys who is attached to any of those Courts, the Supreme Court, or any Judge of those Courts or any of the shall be and are hereby abolished.

IV. A folio is to comprise 72 words, every figure comprised in a column, or authorised to be used, being counted as one word.

V. The provisions of Order 71 of the rules of the Supreme Court, 1883, shall apply to this Order.

VI. This Order shall come into operation on the 25th day of January, 1884, and may be cited as "The Order as to Supreme Court Fees, 1884."

The SCHEDULE above referred to.

An Order or Rule herein referred to by number shall mean the Order or Rule so numbered in the rules of the Supreme Court, 1883.

SUMMONSES, WRITS, NOTICES, COMMISSIONS, AND WARRANTS.

	£	s.
1. On sealing a writ of summons for commencement of an action	0	10
2. On sealing a concurrent, renewed or amended writ of summons for commencement of an action	0	2
3. On sealing a notice for service under Order 16, rule 48	0	2
4. On sealing a writ of mandamus	1	0
5. On sealing a writ of subpoena for witnesses, not exceeding three persons	0	5

	£	s.	d.
6. On sealing a writ of execution, a subpoena pursuant to the Court of Probate Act, 1858, Section 23, and every other writ	0	5	0
7. On sealing or issuing an originating summons under the Act 6 and 7 Vict. c. 73, for the taxation of a solicitor's bill of costs within twelve months after delivery, or delivery of a bill of costs by a solicitor, including the Order to be made thereon	0	10	0
8. On sealing any other originating summons	0	10	0
9. On amending same	0	5	0
10. On sealing or issuing a summons for directions under Order 30	0	10	0
11. On sealing or issuing any other summons, or Taxing Master's Warrant	0	3	0
12. On filing a notice to have a reference to an Admiralty Registrar placed in the list for hearing	0	10	0
13. On a notice in Admiralty actions pursuant to Order 67, rule 10	0	15	0
14. On sealing or issuing a commission to take oaths or affidavits in the Supreme Court	5	0	0
15. On every other commission	1	0	0
16. On marking a copy of a petition of right for service	0	5	0

APPEARANCES.

17. On entering an appearance, for each person	0	2	0
18. On amending same	0	2	0

COPIES.

19. On a copy of a written deposition of a witness to enable a party to print the same, for each folio	0	0	4
20. On examining a written or printed copy, and marking or sealing same as an office copy, for each folio	0	0	2
21. On making a copy and marking same as an office copy, for each folio	0	0	6
22. On a copy in a foreign language—the actual cost.			
23. On a copy of a plan, map, section, drawing, photograph, or diagram—the actual cost.			
24. On a printed copy of an order, not being an office or certified copy, for each folio	0	0	1

ATTENDANCES.

25. On an application, with or without a subpoena, for any officer to attend as a witness, or to produce records or documents to be given in evidence (in addition			
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to the reasonable expenses of the officer) for each day or part of a day he shall necessarily be absent from his office £ 5
1 0

The officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further expenses which may probably become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application.

The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited.

OATHS, &c.

26. On taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, for each person making the same 0 1
27. And in addition thereto for each exhibit therein referred to and required to be marked 0 1

FILING.

28. On filing a special case or petition of right 1 0
29. On filing, except in Admiralty actions, and unless otherwise provided, an affidavit, deposition, or set of depositions (including any exhibits annexed to any such affidavit or deposition), statement of claim in default of appearance, official and special referees' certificates, petition, preliminary act, submission to arbitration, award, warrant of attorney, cognovit, bail, satisfaction piece, bond, writ of execution with return and power of attorney, and every other proceeding in a probate action, or in a divorce or other matrimonial cause or matter required by Act of Parliament, general order or order in the action cause or matter to be filed in the Principal Probate Registry 0 2
30. On filing a scheme pursuant to the Railway Companies' Act, 1867, or the Liquidation Act, 1868 1 0
31. On filing scripts in a probate action or on depositing, pursuant to an Order in any cause or matter, any documents for safe custody or production, if the number does not exceed five 0 5

	£	s.	d.
32. If exceeding five	0	10	0
33. On a receipt for any document or documents to which the two last fees apply, when delivered out, or for any other document or documents when delivered out of the Principal Probate Registry	0	2	6
34. On filing an affidavit and notice under Order 46, rule 4	0	10	0
35. On every minute in Admiralty actions pursuant to Order 66, rule 8, for every instrument or document to which the minute relates (other than an exhibit, or any instrument or document previously issued from the registry or the marshal's office), unless otherwise provided	0	5	0
36. On filing a bill of sale and affidavit therewith where the consideration (including further advances) does not exceed £100	0	5	0
37. Above £100 and not exceeding £200	0	10	0
38. Above £200	1	0	0
39. On filing under the Bills of Sale Acts, 1878 and 1882, any other document to which the fees Nos. 36, 37, and 38 do not apply	0	10	0
40. On filing an affidavit of re-registration of a bill of sale or any such other document as in No. 39 mentioned	0	10	0
41. On filing a fiat of satisfaction	0	5	0

CERTIFICATES.

42. On a certificate of appearance, or of a pleading, affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof, unless otherwise provided	0	2	6
43. Or if required for use in a foreign country	0	5	0
44. Or if a certificate of proceedings pursuant to Order 61, rule 24	0	5	0

SEARCHES AND INSPECTIONS.

45. On an application to search for an appearance or an affidavit, and inspecting the same	0	1	0
46. On an application to search an index, and inspect a pleading, judgment, decree, order or other record, unless otherwise expressly provided for by any Act of Parliament or this Order, and to inspect scripts filed or documents deposited pursuant to an Order for			

	safe custody or production, for each hour or part of an hour occupied	£ s. d. 0 2
47.	Not exceeding on one day	0 10

EXAMINATION OF WITNESSES.

- | | | |
|-----|---|------|
| 48. | On every memorandum of appointment for an examination to be taken before an examiner of the Court | 0 5 |
| 49. | On every witness sworn and examined by an officer of the Court in his office, unless otherwise provided, including oath, for each hour or part of an hour | 0 10 |
| 50. | On an examination of witnesses by any such officer away from the office (in addition to reasonable travelling and other expenses), per day | 3 0 |
| 51. | The officer may require a deposit of stamps on account of fees and a deposit of money on account of expenses, which may probably become payable beyond any amount paid for fees and expenses upon the examination, and the officer, or his clerk, taking such deposit shall thereupon make a memorandum thereof and deliver the same to the party making the deposit. | |

The officer may also require an undertaking, in writing, to pay any further fees and expenses which may become payable beyond the amount so paid and deposited.

HEARING.

- | | | |
|-----|---|------|
| 52. | On entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause or matter for trial or hearing in any Court in London or Middlesex or at any assizes, including hearing on further consideration where no such fee was paid on the original hearing, whether on summons adjourned from chambers or otherwise, and including special case, a petition in a Divorce or Matrimonial cause or matter by which a proceeding is commenced, and petition of right, but not any other petition, nor any other summons adjourned from chambers | 2 0 |
| 53. | On entering directions of the Judge at a trial pursuant to Order 36, rules 41 and 42, and certifying same when required | 1 0 |
| 54. | On writing for the attendance of Trinity masters or other assessors on the hearing of an Admiralty action | 0 10 |

	£	s.	d.
55. On answering and setting down for hearing in Court a petition by which any proceeding is commenced, unless otherwise provided	1	0	0
56. Any other petition	0	10	0

JUDGMENT, DECREES, AND ORDERS.

On drawing up and entering judgments, decrees, and orders—

- | | | | |
|--|---|----|---|
| 57. If made in Court on the original hearing or hearing on further consideration of a cause, or on the hearing of a special case or petition, or on any application to the Court of Appeal, unless otherwise provided | 1 | 0 | 0 |
| Where in a Divorce or Matrimonial cause or matter a decree nisi is made, and afterwards a decree absolute, no fee shall be payable on the decree absolute. | | | |
| 58. If a judgment without hearing in Court, or a final order in a Probate action made by a Registrar, or if an order made in a Probate action or in a Divorce or matrimonial cause or matter on a motion, including filing the case, or application on which the order is made | 0 | 10 | 0 |
| 59. If made on the hearing of an originating summons, unless otherwise provided | 0 | 10 | 0 |
| 60. If made at chambers in the Chancery Division on the hearing of a cause or matter on further consideration | 0 | 10 | 0 |
| 61. If made under Order 15, Order 32, rule 6, or Order 33, rule 2 | 0 | 10 | 0 |
| 62. If made on any application by Order 55, rule 2, directed to be disposed of in chambers comprised in sections (1), (2), (3), (5), (6), (7), or (10) of the said rule, exclusive of those comprised in section (12) of the same rule | 0 | 10 | 0 |
| 63. If an order of course on a petition of right | 0 | 10 | 0 |
| 64. If an order for a commission on a petition of right | 1 | 0 | 0 |
| 65. If an order of course under the Act 6 and 7 Vict. c. 73, to tax a solicitor's bill of costs within 12 months after delivery, or for delivery of a bill of costs by a solicitor where fee No. 7 is not applicable | 0 | 10 | 0 |
| 66. On any other order, including an agreement filed pursuant to Order 52, rule 23, in Admiralty actions, and filing same | 0 | 5 | 0 |
| 67. On signing a note or memorandum of an order pur- | | | |

- suant to Order 52, rule 14, when required for pro- £ s. d.
duction, where no order is drawn up 0 3
68. On a memorandum to enter an order nunc pro tunc 0 5

ON PROCEEDINGS IN THE CHANCERY DIVISION, AT THE
JUDGES' CHAMBERS, OR BEFORE A TAXING MASTER
OR DISTRICT REGISTRAR.

69. On the sale or mortgage of any land or hereditaments
pursuant to any order directing a sale or mortgage
with the approbation of the Judge made in any
cause or matter for the purpose of raising money to
be dealt with by the Court in such cause or matter
for every £100 or fraction of £100 of the amount
raised 0 2
70. On the approval of the purchase of any land or
hereditaments, or of the title to any land or heredita-
ments, to be purchased pursuant to any order in any
cause or matter with money under the control of the
Court in such cause or matter for every £100 or
fraction of £100 of the amount of the purchase
money 0 2
71. On proceedings pursuant to an order in any cause or
matter where the amount of the outstanding or un-
disposed of estate of a deceased person or of the
estate subject to any trust or partnership shall be as-
certained for the purpose of being dealt with in such
cause or matter without deducting any payment to
creditors or parties interested after the commence-
ment of the cause or matter, for every £100, or
portion of £100, of the amount or value thereof 0 1
72. On taking an account of moneys received by an ex-
ecutor, administrator, trustee, agent, solicitor, mort-
gagee, co-tenant, partner, receiver, guardian, con-
signee, bailee, manager, provisional, official, or other
liquidator, sequestrator, or execution creditor, or
other person liable to account for every £100, or
fraction of £100 of the amount found to have been
received without deducting any payment 0 1
73. On taking an account of the debts or ascertaining the
amount of any debt due from a deceased person or
from any company in any cause or matter when any
creditor shall be required to prove his debt other-
wise than by production of his security, for every
£100 or fraction of £100 of the amount found to
be due to such creditor, or if more than one, of the
aggregate amount found to be due to all such credi-
tors 0 1 6

	£	s.	d.
74. And in any such case, if after evidence adduced by the creditor his claim shall be disallowed, on each such claim	0	10	0
75. On taking an account of or ascertaining the amount due in respect of the debentures or bonds of a joint stock or other company, for every £100 or fraction of £100 of the aggregate amount found to be due	0	2	0
76. On an enquiry to ascertain the heir and next of kin, or the heir or the next of kin of any one or more than one deceased person whose estate is being administered in any cause or matter or in respect of whose estate an application is made under Order 55, rule 3, and on any such enquiry at chambers upon an application under the Act 10 and 11 Vict. c. 96 (the Trustee Relief Act), or the Lands Clauses Consolidation Act, 1845, or any other Act whereby the purchase money of any property sold is directed to be paid into Court	1	0	0
77. On settling a list of shareholders entitled to a return, where there is any money to be returned, or a list of contributories, for every person settled on either such list not exceeding 2,000.	0	2	0
78. On settling under the 13th section of the Companies Act, 1867, the list of the creditors of a limited company which proposes to reduce its capital	5	0	0
79. On settling a scheme pursuant to the Railway Companies Act, 1867, or the Liquidation Act, 1868	5	0	0
80. On settling a scheme for the management of a charity	2	0	0
81. On a certificate of a chief clerk, taxing master, or district registrar of the result of any proceeding or taxation of costs before him, including one or any number of matters.	0	10	0

The amount on which the fee No. 69 is payable shall not include the amount which may be payable out of the money raised to any mortgagee or other person entitled to any charge, estate, or interest on or in the property sold, when such mortgagee or other person is not in respect of his mortgage, charge, estate, or interest a party to the cause or matter in which the order is made, or bound by the proceedings, although he may consent to or concur in the sale.

The amount on which the fee No. 71 is payable shall not include any outstanding debts believed to be bad or irrecoverable, nor any property the value of which is undefined or uncertain, nor any property to which the fee No. 69 is applicable, nor any money on which the fee No. 72 shall be payable in the same cause or matter.

The amount on which either of the fees Nos. 70 and 72 is payable shall not include any sum of money or any money arising from the sale

of any property upon which either of the fees Nos. 69 and 71 shall have been previously paid.

The value of any stocks, funds, debentures, securities, shares, or other property, the price of which is quoted in the London Daily Stock and Share list, published by the authority of the Committee of the Stock Exchange, to which the fee No. 71 is applicable, shall be the closing price quoted in such published list on the day previous to the fixing the amount of such fee.

When the fee No. 72 shall be applicable to any money received which shall be invested or deposited in a bank, and again be received from such investment or deposit, or shall be paid by one person accounting to any other person accounting in the same cause or matter or in any other similar case, the fee shall not be payable twice on the same money in the same cause or matter.

When a fee shall be payable on the money raised by the sale of property, and the same property shall be resold, in the same cause or matter, the fee payable on the first sale shall be deducted from the fee payable on the second sale.

The amounts for or in respect of which the following fees are payable shall be limited to £200,000 in the following cases—(a) the amount raised at any time or times in the same cause or matter in the cases to which the fee No. 69 is applicable; (b) the amount of purchase money to be invested pursuant to any one Order in the cases to which the fee No. 70 is applicable; (c) the amount in the same cause or matter of the value of the outstanding or undisposed of estate whenever ascertained in the cases to which the fee No. 71 is applicable; (d) the amount at any time or times in the same cause or matter found to have been received by any executor, administrator, or trustee in the cases to which the fee No. 72 is applicable, except in the case of a trustee directed to account periodically, and in that case, and in all other cases to which the fee No. 72 is applicable, the amount found to be due by any one certificate or on any one account; (e) the amount at any time or times in the same cause or matter found to be due to a creditor or creditors in the cases to which the fee No. 73 is applicable; (f) the amount found to be due in respect of debentures or bonds in the cases to which the fee No. 75 is applicable.

The fees Nos. 69 to 80 inclusive shall become due and payable by the party conducting the proceedings to which they apply as part of his costs of such proceedings, and be allowed as follows or otherwise as the Court or a Judge shall direct; that is to say, the fee No. 71 shall become due and payable upon making the certificate or order by which the outstanding or undisposed of estate is ascertained or as to any part thereof the value of which is at that time undefined or uncertain, and which during the further proceedings in the cause or matter shall be realised or the value of which shall be ascertained upon any order or certificate made when or after the same shall be so realised or the value thereof ascertained. The fee No. 72 on taking the account of a receiver, guardian, consignee, bailee,

manager, liquidator, sequestrator, or execution creditor, or a trustee directed to pass his accounts periodically shall, upon payment, be allowed in the account unless otherwise ordered by the Court or a Judge. The fee No. 72 in the other cases to which it applies, and the fees Nos. 69, 70, and 73 to 80 inclusive, shall become due and payable by the party conducting the proceeding, on making the certificate or order on the result of the sale, purchase, account, inquiry, or other proceeding to which the fee is applicable; but if the Court or a Judge shall be of opinion that the costs of the party liable to the payment of any such fees will become payable out of any funds or moneys in Court, or to be brought into Court, the Court or Judge may suspend the payment of any such fees until such funds or moneys are dealt with, or for such other time as may be thought fit, in which case the amount payable shall be stated in the certificate or order upon which the same are payable, or in some subsequent certificate or order, and where such fees have not been paid, and the costs are directed to be paid out of money in Court or out of the proceeds of securities in Court, the Taxing Master shall certify the amount of fees payable in respect of such proceedings, and the Paymaster shall, if so provided by the rules under the Supreme Court of Judicature (Funds, &c.) Act, 1883, carry over the amount so certified to be payable from the account to which such moneys or proceeds are placed to a separate account in the books of the Pay Office for fees on proceedings or otherwise as shall be provided by such Rules, and the amount shall from time to time, as the Treasury may direct, be paid to the account of Her Majesty's Exchequer.

ON PROCEEDINGS IN THE QUEEN'S BENCH AND PROBATE, DIVORCE, AND ADMIRALTY DIVISIONS, EXCEPT IN ADMIRALTY ACTIONS BEFORE A MASTER, REGISTRAR, OR DISTRICT REGISTRAR.

82. The fee No. 72 on taking accounts applicable to *£ s. d.* proceedings in the Chancery Division upon similar proceedings in these divisions—
83. On every other reference, investigation, or inquiry, including examination of witnesses, if any, for every hour or part of an hour the officer is occupied . 0 10 0

ON PROCEEDINGS IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISIONS IN ADMIRALTY ACTIONS ON REFERENCES BEFORE A REGISTRAR OR DISTRICT REGISTRAR.

84. On any reference to the Registrar, including examination of witnesses, if any, having regard to the nature and importance of the accounts and other matters, and to the time occupied { From 5 5 0 to 15 15 0

		£	s.	d.
85. If the attendance of one or more merchants is required, for each merchant the same fees as to the Registrar	}	From		
		5	5	
		to		
		15	15	
86. In cases of great intricacy, or very large amount occupying more than two full days, larger fees may be taken, not exceeding five guineas additional per day to the Registrar and for each merchant, for every day beyond two full days.				
87. In cases where the accounts to be investigated do not exceed £500, and where the time occupied is short, fees may be taken for the Registrar and each merchant of	}	From		
		1	1	
		to		
		4	4	

PROCEEDINGS BEFORE AN OFFICIAL REFEREE.

88. On every reference	5	0
89. And for every hour or part of an hour he is occupied beyond two full days	0	10
90. On every sitting elsewhere than in London or Middlesex a further fee for every night the Official Referee shall be absent from London	1	11
91. And for his clerk	0	15

The fees Nos. 82 to 91 inclusive shall become due and payable to the party conducting the proceedings on the report of the result of the reference or otherwise as hereinafter provided where no such report made.

The above-mentioned fees Nos. 69 to 80 and 82 to 91 inclusive shall be due and payable, when no certificate, report, or order is made by the party conducting the proceedings on the completion of such proceedings, or if not completed, a due proportion shall be payable on so much of the proceedings as shall have taken place, the amount to be fixed by the officer.

In these cases the fees shall be paid by stamps impressed upon and affixed to a memorandum stating on what account such fees are paid.

A deposit of stamps on account of the fees applicable to any proceeding may be required before such proceeding is commenced, or any time during the course thereof, and in Admiralty actions where Order 56, rule 4, applies, such stamps shall be affixed as there provided, and in all other cases a memorandum of the amount deposited shall be delivered to the party making the deposit.

IN THE ADMIRALTY MARSHAL'S OFFICE.

		£	s.
92. On the execution of a warrant		2	0
93. On the execution of an attachment, for every person attached		1	0

	£	s.	d.
94. On the execution of any decree, order, commission, or other instrument under Order 67	1	0	0
95. On attending, appointing, and swearing appraisers	1	0	0
96. On delivering up a ship or goods to a purchaser agreeable to the inventory	1	0	0
97. On attending the delivery of cargo, or sale or removal of a ship or goods, per day	2	0	0
98. On retaining possession of a ship with or without cargo, or of a ship's cargo without a ship, to include the cost of a ship keeper, if required, per day	0	5	0
99. On a report as to the insufficiency of sureties	0	10	0
100. If the Marshal or any of his substitutes is required to go a greater distance than five miles from his office to perform any of the above duties, he shall be entitled to his reasonable expenses for travelling, board, and maintenance, in addition to the above fees.			
101. On the sale of any vessel or goods sold pursuant to a Decree or Order of the Court, for every £50 or fraction of £50 realised	0	10	0

TAXATION OF COSTS.

102. On taxing a bill of costs where the amount allowed does not exceed £4	0	2	0
103. Where the amount exceeds £4, for every £2 allowed or a fraction thereof	0	1	0

These fees, unless otherwise provided, shall be taken on signing the certificate or on the allowance of the bill of costs as taxed; but the fees shall be due and payable, if no certificate or allocatur is required, on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.

The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk on taking such deposit shall make a memorandum thereof on the bill of costs.

Order 5, rule 58, of the Chancery Funds Consolidated Rules, 1874, shall continue to be acted upon in cases to which it is applicable.

ON PROCEEDINGS IN THE PAY OFFICE OF THE SUPREME COURT.

	£	s.	d.
104. On a certificate of the amount and description of any money, funds, or securities, including the request therefor	0	1	
105. On a transcript of an account for each opening	0	2	
106. On a request to the Paymaster, Bank of England, or a Registrar of the Probate, Divorce, and Admiralty Division (unless otherwise provided), for any of the following purposes :—paying, lodging, transferring or depositing money, funds, or securities in Court without an order, or money in addition to the amount directed by an order to be paid in ; paying out of Court any money without an order or a certificate of a taxing officer, information in writing in respect of any money, funds, or securities, or any transaction in the Pay Office	0	1	
107. On a request for information respecting any money, funds, or securities to the credit of any cause or matter contained in any list prepared by the Paymaster of causes and matters to the credit of which any money, funds, or securities have not been dealt with during fifteen years	0	2	
108. On an affidavit for the purpose of paying, transferring, or depositing any money, funds, or securities in Court, pursuant to the Statute 10 & 11 Vict. c. 96	0	1	
109. On preparing a Power of Attorney	0	3	

REGISTER OF JUDGMENTS AND LIS PENDENS.

110. On registering a judgment or lis pendens, although more than one name may have to be registered	0	2	
111. On re-registering same	0	1	
112. On a search for each name	0	1	
113. On a certificate of entry of satisfaction	0	1	
114. On a request for a search and Certificate pursuant to Order 61, rule 23	0	5	
115. If more than one name included in the same request, for each additional name	0	2	
116. On a duplicate certificate, if not more than three folios	0	1	
117. For every additional folio	0	0	
118. On every continuation search, if requested within 14 days of any former search (the result to be endorsed on such certificate)	0	1	

	£	s.	d.
119. On certificate of a judgment for registration in Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit	0	2	0
120. On filing for registration a certificate issued out of the Courts of Dublin or Court of Session in Scotland under the last-mentioned Act, although more than one name may have to be registered under the same Act	0	7	0
121. On every certificate of the entry of a satisfaction under the last-mentioned Act	0	1	0
122. On a search made in one or both of the registers of Irish and Scotch judgments for each name	0	1	0

MISCELLANEOUS.

123. On a report of a Private Bill in Parliament	5	0	0
124. On an allowance of bye-laws or table of fees	1	0	0
125. On a fiat of a Judge	0	5	0
126. On signing, settling, or approving an advertisement	0	10	0
127. On taking the acknowledgment of a deed by a married woman	1	0	0
128. On an appointment of a receiver in a probate action	1	0	0
129. On taking a recognizance or bond, whether one or more than one recognizor or obligor, and whether entered into by all at one time or not	0	10	0
130. On assignment of a bond	0	5	0
131. On taking bail, and taking same off the file and delivering	0	2	0
132. On a commitment	0	5	0
133. On an application to produce Judge's notes	0	5	0
134. On appointment of commissioners under glebe exchange	1	0	0
135. On vacating a recognizance	0	10	0
136. On a citation	0	5	0
137. On the admission or re-admission of a solicitor	5	0	0
138. On filing a claim in the Admiralty Registry for repayment of the excess of wages paid to a substitute hired in the place of a volunteer into the Royal Navy, including copy sent to the Admiralty	0	10	0
139. On the opinion of the Admiralty Registrar objecting to the claim	0	10	0
140. On a certificate of the Admiralty Registrar ordering payment of amount due, including the copy to be sent to the Accountant-General of the Navy	0	10	0
141. On registering in the Admiralty Registry a power of attorney for a Queen's Ship generally, and a copy thereof for the Accountant-General of the Navy	1	10	0

	£	s.	d.
142. On registering same specially	0	10	0
143. On taking accounts by the Admiralty Registrar in Naval Prize Matters	0	5	0
144. On Admiralty Registrar writing letters in regard to Naval Prize Matters	0	10	0
145. On every £50, or fraction of £50, paid out of the Admiralty Registry in any action, or to the Naval Prize Account	0	5	0

No fee is payable on the transfer of money from the Admiralty Registry to the Naval Prize Account.

SELBORNE, C.

COLERIDGE, C.J.

W. B. BRETT, M.R.

JAMES HANNEN, *President P.D.A. Div*

We concur in the above Order,

C. C. COTES,

H. J. GLADSTONE,

Lords Commissioners of Her Majesty's Treasury.

NOTICE.—QUEEN'S BENCH DIVISION.*

FIXED COSTS IN CASES OF JUDGMENT BY DEFAULT.

COURT FEES.

THE Fees payable in these Cases having been increased by the "Order as to Supreme Court Fees, 1884," the Masters direct that the allowance for Costs of Judgment be increased accordingly in all Cases where such additional Fees have been paid. The amount of Costs therefore will be as follows :—

	£	s.	d.
In Cases for a sum exceeding £50 on <i>specialty indorsed Writs</i> issued on or after 25th January, 1884, in Country and Agency Cases, and in Cases where Service effected more than five miles from General Post Office, St. Martin's-le-Grand	5	6	0
Town Cases	4	14	0
And in addition for each extra Service	0	6	0

The above Allowances to include all mileage.

And in Cases where Writs are indorsed for a liquidated claim, but not specially, and in Cases in which the sum recovered amounts to £20 and upwards and does not exceed £50, as follows :—

	£	s.	d.
In Country and Agency Cases, or where Service effected more than five miles from the General Post Office, St. Martin's-le-Grand	4	12	0
Town Cases	4	0	0
And in addition for each extra Service	0	6	0

The above Allowances to include all mileage.

In Cases under £20, no Costs, unless Order for Costs.

BY ORDER OF THE MASTERS.

31st January, 1884.

* This scale supersedes the scale given *ante* pp. 112, 302.



INDEX.

—o—

- ABATEMENT—**
plea in, abolished, 82
- ABIDE EVENT—**
costs to, *see* tit. AWARD, EVENT
- ABSTRACTS OF TITLE—**
costs of, when allowed on taxation, 201
allowance for examination of, in cause or matter, 288
- ACCOUNT—**
taxation of bill of costs forming part of, 168
- ACTION—**
costs of, where brought in wrong form, 121
when brought or defended by solicitor without authority, 191
matters arising pending, may be pleaded, 100, 101
on bill of costs, 235 *et seq.*
See tit. AGREEMENT BY SOLICITOR, BILL OF COSTS.
payment into court, where actions consolidated, 65
costs of, on payment of claim and costs, where several actions by underwriters consolidated, *addenda*
form of order to dismiss, for want of prosecution, 268
- ADJOURNMENT—**
service of notice of, not to be allowed where any appointment is or ought to be adjourned, 224, 280
- ADMINISTRATOR—**
See tit. EXECUTOR AND ADMINISTRATOR.
- ADMISSION OF FACTS—**
effect of, 136
costs of proving facts not admitted after notice, 136
costs where facts improperly denied or not admitted, 136
- ADMIT—**
notice to, allowance for preparing, 224, 280
- AFFIDAVIT—**
notice to produce documents referred to in, 137.
costs of office copy, if discovery not allowed, 139
unnecessary prolixity in title of, disallowed, 192, 226
setting forth unnecessary matters of hearsay and other matters, disallowed, 192, 226
when containing scandalous matters, 192
to be drawn up in first person, 192
divided into paragraphs, consecutively numbered, 192
written or printed bookwise, 192
costs of, when substantially departing from form, 192
to be stamped, 193
to state by whom filed, 204
office copy of, when it may be used, 193
not necessary when original may be used, 193, 204
folios to be numbered consecutively, 204
allowance for drawing, includes copy, 193
where several deponents to be sworn, 193
for agent where deponent lives at distance, 193

AFFIDAVIT (continued)—

discretion of master as to making special allowances, 193
 costs where party or solicitor refuse to furnish copy of, 193
 party producing deponent for cross-examination not entitled to expenses in first instance, 194
 effect of non-production of deponent for cross-examination, 194
 fees on taking, filing, &c., 312, 326, 327

AFFIDAVIT OF INCREASE—

to be given in all cases where notice to tax necessary, 174
 service of copy of, 174, 176
 what must be sworn to, in, 176
 materiality of witnesses to be sworn to, in, 176
 effect of want of, on allowances to witnesses formerly, 176
 costs of pleadings and office fees of proceedings down to trial, need not be sworn to, in, 177

AGENT—

allowance to, for letters and correspondence in agency causes or matters, 222, 288, 289
 for service of notices, 223
 expenses of unnecessary service of notices upon country solicitor, instead of upon agent, disallowed, 224
 lien of, for costs, to what it extends, 232
 taxation of agent's bill of costs, 241

AGREEMENT BY SOLICITOR—

for lump sum for services, 239
 must be in writing signed by both parties, 239
 to charge nothing if action lost, and if won to take nothing from client for costs out pocket, need not be in writing, 239
 amount payable under, not to be paid until examined and allowed by master, 239
 may be cancelled, if unreasonable, and costs taxed in ordinary way, 239
 must not affect rights of third party, 239
 excludes further claims, 240
 no action to be brought on, where work done, 240

AGREEMENT BY SOLICITOR (contin-

secus where client refuses to :
 work to be done, 240
 may be re-opened after payment under special circumstances, solicitor may take security client for future fees, charges, &c., to be taxed, 240

ALLOCATUR—

in nature of award between parties, 178
 the property of the person whose favour made, 178
 conclusive as to amount of, 178, 180
 interest on costs runs from date, 179
 objection to taxation may be before signing of, 179
 reconsideration of taxation master before signing, 179
 taxation cannot be reviewed by Judge before master has signed, 180
 total amount of costs to be paid in, when costs to be paid out of fund in Court, 169
 where bill of costs referred to master, is conclusive as to amount, 239
 form of, 290

AMENDMENT—

of indorsements or pleading terms, 127
 time within which, to be made by plaintiff or defendant, 127
 costs of, 127
 allowed or disallowed on terms, 127
 at trial, 128
 general power of Court or Judge to amend on terms, 128
 lump sum may be awarded in lieu of costs, 128
 unnecessary, of pleadings, costs of, 128
 costs of, where costs paid by plaintiff or by defendant, 127
 clerical mistakes, 128
 terms on which, generally allowed, 129, 94
 what costs allowed on taxation, 129
 period during which order may be amended in force, 129
 costs of, at trial, not allowed where party not misled by pleading, 129

AMENDMENT (*continued*)—

- power of Judge at chambers to fix amount of costs of application for, 132
- scale of allowance for, 205, 284

AMENDS—

- tender of, *see* tit. TENDER.

ANTIQUARY—

- expenses of, for searches and translations of ancient documents allowed, 218
- allowance to, depends on whether expenses reasonably incurred, 218

APPEAL—

- none as to costs only, without leave, 6
- in interpleader, 7
- lies from order imposing condition of payment of costs, 6
- on a question of principle, 7
- to Judge from order of Master or District Registrar as to costs, 8
- to House of Lords, staying payment of costs pending, 161

APPEAL, COURT OF—

- jurisdiction of, over costs of appeal, 158
- successful appellant generally gets costs of appeal, 158
- effect of reversal of judgment by, on costs in Court below, 158
- no power to alter order, when made, as to interlocutory costs, 158
- costs given by, taxable at once, 158, 161
- where Court divided in opinion, 158
- where there is appeal and cross appeal, 158
- notice of cross appeal, when necessary, 159
- costs of printed evidence for purposes of appeal, 159
- interest allowed on judgment where execution delayed by appeal, 159
- respondent to make substantive motion for costs where appeal not entered pursuant to notice, 159
- security for costs, to be given under special circumstances, 159
- application for, to be made without unreasonable delay, 160
- how to be made, 161
- how to be given, 161
- order for, to be complied with within reasonable time, 161

APPEAL, COURT OF (*continued*)—

- payment of costs not generally stayed pending appeal to House of Lords, 161
- fee payable on entering appeal to, 328

APPEARANCE, *see* tit. DEFAULT OF APPEARANCE.

- fees payable on entering, 325
- on amending same, 325
- on application to search for, 327

APPOINTMENT TO TAX—

- one only necessary, 175
- party who has conduct of order obtains, 175
- what attendance sufficient on, 175
- nominal allowance where party fails to attend taxation after peremptory appointment, 175

APPORTIONMENT OF COSTS OF ISSUES, *see* tit. ISSUES.

- discretion of Master as to, 164
- costs of several issues respectively in law and fact follow event, 92, 163
- party for whom final judgment entered entitled to costs of the cause, 163
- costs of issues to which successful party entitled, 163, 165, 200
- where party unsuccessful, 163
- where plaintiff nonsuited, 165
- where there is claim and counter-claim, 165
- where there are several defendants, 166
- where defendants defend by separate solicitors, 166
- principle on which costs of several items of claim taxed, 164
- issues to be construed distributively, 164
- defendant may tax costs of issues found in his favour though plaintiff deprived of costs, 165
- where name of one of several defendants struck out at trial, 166
- payment of costs where there are several defendants, 167
- when ordered to be paid to a particular defendant, 167
- where issues found different ways, 200

ARBITRATION, *see* tit. AWARD.

ARREST OF DEFENDANT—

costs of, under Debtors' Act, *see* tit.
DEBTORS ACT.

ASSESSMENT—

of damages, on judgment by default,
110, 111
form of judgment after, 262

ATTACHMENT—

of debts, *see* tit. GARNISHEE
ORDERS.
for non-payment of costs of dis-
continuance, 103

ATTENDANCE OF MASTERS, *see* tit.
MASTERS—

for purposes of taxation, at Central
office, 169

ATTENDANCE OF SOLICITOR—

At trial or on reference,
allowance in discretion of master,
194
where trial or reference in town,
194
not in town, 194
allowance where attendance on
more than one trial at same time
and place, 194
attendance of town solicitor at
assizes, if necessary, allowed, 195
costs of country solicitor attending
trial in town, in the discretion of
the master, 195
solicitor attending as solicitor and
witness, only allowed in one char-
acter, 195
solicitor, if party to an action, allowed
usual costs, 195
allowance of solicitor and clerk to
conduct trial, the solicitor being a
witness, 195
solicitor justified in attending on
commission day at the assizes,
195
personal liability of solicitor for
costs occasioned by non-attend-
ance at trial, 196
At Judges' Chambers—
ordinary allowances for, 196
special allowances for, 196
power of Judge to order costs of
non-attendance, to be paid by
party or solicitor personally, 197
allowances provided by the scale
for, 285

AWARD—

modes of referring cause or matter
in dispute, 50
reference under Judicature Act,
1873, 50
under the C. L. P. Act, 1854
order of reference silent as to effect of, 51
certificate under County Court
Act, 1867, s. 5, to be given
award, 51
power of arbitrator over costs generally, 51
arbitrator has no power over costs
ordered to abide event, 52
costs, where each party directed to
pay his own costs, 52
costs of award include costs of reference, 52
where award silent as to costs, to
follow event, 52
costs in discretion of arbitrator
under submission, 52
costs of making award rule of
Court, 52
each party entitled to costs of is
found in his favour, when, 52
"Costs to abide event," meaning
term, 52, 57
costs of cross issues, 53
illustrations, 53, 54
costs of claim and counter claim,
55
arbitrator to dispose of each issue
specifically, 57
costs of application to set aside
award, 57
when application to be made, 57
taxation of costs of award, 57
costs of cause, where matter referred
to arbitration and award,
costs of witnesses before arbitrator,
219, 220, *see* tit. WITNESSES.
fee payable on filing, 326

BANKRUPTCY—

does not abate action, 82
trustee in, to be made party
terms as to costs, 83
security for costs where plain-
defendant bankrupt, 79, 80, 81

BILL OF COSTS, *see* tit. AGREEMENTS
TAXATION.

allowance on taxation of, 183
where more than one-sixth tax
off, solicitor liable for costs
taxation, 183

BILL OF COSTS (*continued*)—

- delivery of copy of, when costs payable out of fund or property, 169, 170
- action by solicitor to recover costs, 235
- taxation of agent's bill, 241
- must give items in taxable shape, 242
- what is a sufficient, 242
- blanks in, 242
- lump sum for services, not sufficiently signed bill within 6 & 7 Vict. c. 73, 242
- signed bill must be delivered, even where lump sum for professional services agreed upon, 242
- bill to be indorsed with name and address of solicitor, 243
- also of solicitor entitled or intended to participate in costs to be taxed, 243
- action on, 235 *et seq.*
 - unqualified person acting as solicitor cannot recover costs or fees, 235
 - solicitor employing unqualified person cannot sue client for costs, fees, &c., 235
 - bill must be delivered one month before action, 235
 - what is sufficient delivery of, 235
- reference of bill to taxation, 236
- application by client, when to be made, 236
 - by solicitor when client does not apply to have bill taxed, 236
- solicitor may be restrained from bringing action on bill, 236
- bill may be referred under special circumstances, 236
- taxation *ex parte*, where solicitor or client fail to attend reference, 236
- costs of reference, 236
 - where one-sixth deducted from bill, 236
 - direction to master to tax, 237
 - to certify circumstances, 237
- improper charges by solicitor disallowed, 236
- proof of contents of bill duly delivered, 237
- solicitor may bring action by leave, before bill has been delivered one month, where client about to leave country or become bankrupt, 237
- third party may apply to refer bill, 238

BILL OF COSTS (*continued*)—

- bill may be retaxed under special circumstances, 238
- payment of bill no bar to reference if special circumstances exist, 238
- except after lapse of twelve months, 238
- allowance on higher scale, on taxation between solicitor and client, 240
- payment of agent's bill by client not binding on solicitor, 241
- except where agent gives credit to client and not to solicitor, 241
- form of order on client's application to tax, 269
- Solicitor's application to tax, 269
 - to tax after action brought, 270
- allowance for drawing, for taxation, 283
- includes copy for taxing officer, 283
- on attendance to tax, 287, 335

BOND—

- when given as security for costs, 91, 161
- fee payable on taking, 91, 337
- on filing, 326
- on assignment of, 337
- how taken, 317
- special indorsement on writ in action on, 116
- payment into Court in action on, when allowed, 58
- default of appearance in action on, 111
- stay of proceedings in action on, 117

BRIEFS—

- allowance for instructions for, in the master's discretion, 197
- expenses of witnesses qualifying may be allowed in instructions for, 197
- costs of premature preparation and delivery of, to be disallowed, 197
- preparing for trial before notice given, disallowed, 198
- where judgment signed for want of defence, 198
- special allowance for instructions for brief, 200
- scale of allowance for instructions where only one brief, 198, 281

BRIEFS (continued)—

- for hearing, or trial where notice given, 198
- fees for instructions for, on higher scale, when allowed, 198
- lengths of, allowed, 199
- where case one of difficulty and many witnesses, number of counsel allowed, 199
- copies of necessary documents allowed, 199
- scale of allowances for briefs and copies of briefs, 199
- charges by solicitor for drawing, 199
- where separate actions by different plaintiffs against same defendant, 200
- where several actions on same instrument by same plaintiff against several defendants, 200
- where issues are found different ways, 200
 - party only entitled to costs of brief relating to issues on which he has succeeded, 200
- abstracts of title, 201
- if witness disallowed, parts of brief relating to evidence disallowed accordingly, 201
- costs of drafts or copies of briefs, prepared before notice of trial given, disallowed, 201
- allowances for briefs on various proceedings, 201

CERTIFICATE—

- of Judge for costs under County Courts Act, 21, 31
- For costs of special jury, 155
- payment into Court under master's, practice as to, 273
- form of judgment on, of County Court Registrar, 264

CHANGING SOLICITOR—

- solicitor may be changed on filing notice in Central Office or District Registry, 241
- former practice as to, 241, 242
- agent could formerly be changed at any time without order, 242

CHARGING ORDER—

- for costs, upon property recovered or preserved, 233
- application for, to be made to Judge at chambers where action pending, 233

CHARGING ORDER (continued)—

- where action has been tried made to Judge before tried, 233
- solicitor entitled to, upon receipt, 233
- extends only to costs in particular matter in which incurred, 233 but not to general costs, 233
- where money paid into Court action, 233
- where money attached under garnishee order, 233 (g)
- mode of serving where party in service, 233 (g)
- form of, for costs, 268

CLAIM—

- costs occasioned by delivery necessary, 129
- relief sought to be specified in, 129
- costs of further and better particulars of, 130

COGNOVIT—

- must be filed before judgment signed, 202
- fees payable on filing, 202, 326
- to be paid by stamp, 202, 326
- costs of, to be taxed except sum fixed, 202
- notice of taxation to be filed, 202

COLLATERAL PROCEEDINGS—

- costs of, not costs in the cause, 140

COMMISSION TO EXAMINE WITNESSES—

- costs of, 139
- expenses of witnesses examined under, when allowed, 139
- taxation of costs of, 140
- discretion of master over costs, 140

CONCURRENT WRITS—

- costs of, when allowed on taxation, 202
- fee on sealing, 324
- how taken, 320

CONDUCT MONEY—

- allowed where witness examined under order of Court, 141
- where official from Central Office attends trial with documents, fees payable to official, 325, 326

CONFESSION OF DEFENCE—

judgment may be signed by defendant for costs upon, 100
form of, 265

CONSTABLES—

tender of amends, in actions against, 68, 69

CONTRACT—

test as to whether action founded on, 23, 24, 25
where £50 or less recovered in action on, costs on County Court scale, 31, 208
one counsel only usually allowed, 208
allowance on judgment under Order 14 for sums between £50 and £20 in actions on, *addenda*

CONVEYANCING COUNSEL—

allowances to, where question referred to, 172
expenses of drafts, settled by order of Court by, *addenda*.

COPIES, *see* also tit. AFFIDAVIT, DEPOSITION, PRINTING—

of documents, maps, or plans for use of Judge and jury, costs of, 135
of pleadings for use of Judge, 135
of documents in possession of third party, charges for, 138
unnecessary, set out in affidavits, disallowed, 192
office copies of writs and pleadings, when allowed, 202
to be marked as such, 203
of affidavits unnecessary where original can be used, 204
allowances for, and costs of printing, 203
written copies of affidavits or depositions, by whom to be supplied, 203
such copies to be applied for in writing, 203
office copies of affidavits, folios of to be numbered consecutively, 204
name and address of party or solicitor to be indorsed on, 204
effect of refusal or neglect to furnish copies after application for same, 204
of affidavits of discovery of documents not necessary, 204
allowances for printing include attendance on printer, 205

COPIES (*continued*)—

close copies, when not allowed, 205
allowances provided by the scale for, 204, 205, 283
fees for drawing documents include copies, 212

COSTS—

where trial of action before Judge alone, 3
with jury, 3
discretion of Judge over, 3
how to be exercised, 5
of action, successful plaintiff may be ordered to pay, 3
successful defendant cannot be ordered to pay costs, 4
may be deprived of costs, 4
of action, Court of Appeal no original jurisdiction over, 6
jurisdiction of Divisional Court over, 6
judge at chambers, 6
application for, when to be made, 6
no appeal as to costs only without leave, 6
rule applies to interpleader proceedings, 7
orders of Judge at chambers, 7
appeal lies on question of principle, 7
from order imposing condition of payment of, 7
from order of Master or District Registrar, 8
court will not make order as to principle on which costs to be taxed, 180
where there are several issues, 16
power of Court or Judge to award lump sum in lieu of, 128, 132, 148
over costs unnecessarily incurred, 226
direction for inquiry as to costs unnecessarily incurred, 226
when unnecessarily incurred, not to be allowed, 229
form of indorsement for costs, 261
right to costs, depends on judgment, *addenda*.

COSTS OF AND IN THE CAUSE—

meaning of, 149
party for whom judgment ultimately entered entitled to, 149
certain costs which *are*,
costs of cause removed from inferior court, 149

COSTS OF AND IN THE CAUSE (*continued*)—

- amendments caused to defendant where plaintiff pays, 149
- but not costs of amendments occasioned by default of defendant, 149
- order of arrest under Debtors' Act, 149
- interlocutory proceedings, 149
- showing cause against rule to set aside award, 150
- unsuccessful application for new trial, unless otherwise ordered, 150
- application for order for directions, 151, 267
- cause made a remanet, 151
- commission to examine witnesses abroad where order silent as to costs, 151
- all necessary notices or copies thereof during action, 151
- statutory notices of action, 151
- issues on which party has succeeded, 151
- production of witness on *hab. corp. ad test.*, 151
- certain costs which *are not*.
 - costs of proceedings incurred by solicitor showing cause against rule in absence of client, 150
 - proceedings where party abandons order "on payment of costs," 150
 - proceedings after final judgment signed, 150
 - where rule discharged or made absolute without costs, 150
 - collateral proceedings, 150
 - costs of witness rejected at trial, 150, 215
 - rejected by arbitrator, 220
 - interrogatories and proceedings thereon, formerly, 151
 - present rule, 151
- what costs are included, where matter referred to arbitration and award, 151
- where plaintiff succeeds, 152
- defendant succeeds, 152
- object of making costs, costs in cause, to prevent separate taxation, 152
- all notices and copies necessary in cause of action allowed as costs in cause, 223

COSTS OF THE DAY—

- where notice of trial commanded, 145, 148
- adjournment of trial upon pay of, 145
- where plaintiff or defendant fail to appear at trial, 145
- where cause made remanet, 14
- on writ of inquiry, 146
- in pauper action, 147
- what costs are included, 147
- mean costs of last day in town
- whole assizes, at the assizes
- defendant formerly not entitle unless jury sworn, 148
- award of lump sum in lieu of costs, 148

COUNSEL—

- fees to be allowed to, in the discretion of the master, 206
- discretion of master seldom interfered with, 206
- court will entertain question where principle involved, : solicitor to use a fair discretion
- payment of fees to, 206
- fees for procuring advice of counsel, 206, 212
- drawing or settling special indorsement on writ, pluries, &c., 206
- case on evidence, 206
- consultation, 206
- case and consultation not allowed until cause at issue, 207
- conferences, 207
- attendance at Judges' Chambers disallowed as between party and party and solicitor client unless Judge certifies, 207
- additional fees to, where additional papers laid before counsel, 208
- retainers to, abolished, 208
- more than one counsel usually allowed where £50, or less covered on contract, 208
- number of counsel to be allowed, discretion of master, 208
- two junior counsel may be allowed where proper to retain two counsel, 208
- three counsel not necessarily allowed where junior counsel appointed Queen's counsel, 208
- attendance by, before arbitrator, 209
- allowance to Queen's counsel acting as arbitrator, 209

COUNSEL (*continued*)—

- employment of, on commission abroad, 209
- one counsel only generally allowed in undefended cases, 209
- party entitled to costs of cause is allowed fees properly paid to counsel, 209
- allowance where one counsel defends several defendants with different solicitors, 209
- number of counsel allowed on writ of inquiry, 210
- refreshers, 210
- scale of allowances for, 210
- allowance to counsel, where judgment delivered after argument, 211
- payment of fees to be vouched, 211
- fees to counsel in Court of Appeal, 211
- counsel's clerks' fees, 211
- discretionary fees or allowances to counsel, 207, 211
- costs of procuring advice of counsel, 212
- fees for settling affidavits to be allowed, 212

COUNTER-CLAIM—

- distinction between, and set-off, 14, 15
- over-topping claim, costs when, 15
- judgment for defendant for balance on, 17
- has same effect as cross-action, 17
- county Courts' Act, 1867, does not apply to, 33
- payment into Court to, 65
- costs payable under Judge's order recoverable by, 249

COUNTERMAND OF NOTICE OF TRIAL—

- only by consent or leave of Court or Judge, 145
- leave to, may be given upon terms as to costs or otherwise, 145

COUNTY COURT—

- costs where action ordered to be tried in, 18, 32
- of remitted action, 32
- scale of costs allowed in, 291

COUNTY COURTS' ACT, 1867—

- certain sections of, preserved by Jud. Acts, 20
- actions excepted from operation of, 20

COUNTY COURTS' ACT, 1867 (*continued*)—

- effect of, on plaintiff's right to costs, 21
- if plaintiff within sect. 5, not entitled to any costs, 22
- certificate for costs under sect. 5, by whom given, 31
- sect. 5 of, applies to action removed into Superior Court, 22
- applies to pauper plaintiff, 23
- to action referred upon terms, 23
- does not apply to counter-claim, 22
- "relief sought" obtainable in County Court, meaning of, 26-31
- costs where £50 or less recovered in action on contract, 31

COURT FEES—

- payable for summonses, writs, commissions and warrants, 324
- appearances, 325
- copies, 325
- attendances, 325
- oaths, 326
- filing, 326
- certificates, 327
- searches and inspections, 327
- examination of witnesses, 328
- hearing, 328
- judgment, decrees, and orders, 329
- proceedings before official referees, 334
- taxation of costs, 335
- register of judgments and *lis pendens*, 336

DAMAGES—

- set-off of, allowed between party and party notwithstanding solicitor's lien, 186, 230
- costs recoverable as, 256
- reason for rule as to recovery of costs as, 256
- taxed costs only recoverable, 256
- extra costs not recoverable as, 256
- costs recoverable as, in actions for malicious prosecution, 257
- upon contract of indemnity, 257
- joinder of third party in action, 257
- costs reasonably incurred by surety recoverable from principal as, 257
- costs recoverable as, if principal consents to surety defending action, 258
- consent to defend may be inferred, 258

DAMAGES (*continued*)—

- costs recoverable as, by joint-surety, 258
- costs of proceedings incurred by wife through conduct of husband recoverable as, 258
- costs recoverable as, in action for not making good title to land, 258
- costs recoverable as, in action for breach of warranty of authority to contract as agent, 258
- what damages recoverable, 259
- costs to be recovered as, must not be too remote, 259
- recovery of costs of ejectment formerly as, in action for mesne profits, 45

DEBTORS' ACT, 1869—

- security for costs under, 91
- sufficiency of, to be determined by master, 91
- power of master to award costs on application for, 91
- plaintiff to object to security within four days, 91
- money deposited and security to be in control of Court or Judge, 91
- costs of order for, costs in cause, 91
- saving as to fees of sheriff executing order of arrest under, *ad-denda*.

DEFAULT OF APPEARANCE—

- where writ specially indorsed for liquidated debt, 109
- where several defendants, 109, 110
- where claim for unliquidated damages writ of inquiry to issue on, 110
- court or Judge may direct manner of ascertaining damages, 110
- writ of inquiry to be executed before costs taxable, 111
- judgment for, where joinder of claims for unliquidated and liquidated damages, 111
- where claim for mesne profits &c. and land, 111
- plaintiff not entitled to costs in action for recovery of land only on, 111
- where third party makes, effect of, 125
- suggestion of breaches in action on bond, 111

DEFAULT OF APPEARANCE (*continued*)—

- setting aside judgment on, 112
- allowances fixed by masters on judgment for, 339
- at trial, 145, 146
- form of judgment for, where liquidated demand, 261
- in action for recovery of land, 262
- after assessment of damages, 262

DEFAULT OF PLEADING—

- application to dismiss action for want of prosecution, 112
- plaintiff where writ specially indorsed can enter final judgment for amount claimed and costs, 113
- costs to be taxed, 113
- delivery of defence after default, but before judgment signed, 113
- where claim for unliquidated damages, default by defendant, 113
- default by one or more of several defendants, 113
- where claim for liquidated and unliquidated damages, 114
- costs on, in action for recovery of land, 114
- where claim for mesne profits, rent, &c., and damages for breach of contract indorsed on writ for recovery of land, 114
- judgment on, may be final or interlocutory for claim unanswered, 114
- motion for judgment on, in certain cases, 115
- setting aside judgment, 115
- execution on judgment by, 115
- not to issue without leave where counter-claim, 115
- form of judgment for, where liquidated demand, 261
- after assessment of damages, 262

DEFENCE—

- costs where facts improperly denied or not admitted in, 136
- judgment may be signed for costs upon confession of, 100
- form of judgment, 265

DEFENDANT—

- right of, to costs generally, *1 et seq.*
- if successful, cannot be ordered to pay costs, 4

DEFENDANT (*continued*)—

- may be deprived of costs, 4
- costs of, where money paid into court in several consolidated actions, 65
- on discontinuance, 98 *et seq.*
- nolle prosequi*, 65, 107
- nonsuit, 65, 106, 165
- judgment on issues of law, 92 *et seq.*
- judgment against one or more of several defendants, on default of appearance, 109, 110
- on default of pleading, 113
- when entitled to costs of the day, 145, 146
- where costs of the day paid by, 147
- costs of issues where there are several defendants, 166
- where defendants defend by separate solicitors, 166
- where name of one of several defendants struck out at trial, 166
- payment of costs by plaintiff where there are several defendants, 167

DEMAND BEFORE ACTION—

- when demand may be expedient, 222
- costs of, not allowed between party and party, 222.
- costs of one letter for payment allowed, 222

DEMURRER, *see* tit. ISSUES OF LAW—

- now abolished, 92
- number of counsel allowed formerly on argument of, 94

DEPOSIT—

- security for costs of action and not of discovery only, *addenda*
- as security for costs, where interrogatories exhibited, 138
- discretion of Judge as to ordering, 139 and *addenda*
- disposal of, 139
- consent of parties to dispense with, not sufficient ground for so ordering, 139, and *addenda*
- dispensed with, on ground of poverty of plaintiff, *addenda*
- required from foreign corporation, *addenda*
- for each party interrogated, *addenda*
- provisions requiring, not applicable to order for discovery of ship's papers, *addenda*
- how made, 308, 309

DEPOSITIONS—

- written copies of, disallowed, if ordered to be printed, 193
- exception, 193
- by whom to be supplied, 203
- to be applied for in writing, 203
- effect of non-refusal or neglect to furnish, 204
- fee for copy of written, for printing, 325
- on filing, 326

DIRECTIONS—Summons for

- when returnable, 130
- costs of, costs in cause, 151, 267
- costs of further unnecessary applications for, 131
- application by opposite party for, 130
- form of order for, 267
- fee on sealing or issuing, 325

DISCHARGE OF JURY—

- as to any particular issue or issues, costs where, 167

DISCONTINUANCE—

- before defence, or after defence
- before step taken by notice in writing, and subsequently by leave, 98
- when defence or counter-claim may be withdrawn, 98
- judgment for costs of discontinued action, 98
- stay of subsequent action where costs of previously discontinued action unpaid, 99
- costs of, when caused by defendant's misconduct, 99
- on death, marriage, or bankruptcy of party, 99
- claimant in ejectment might formerly discontinue upon giving notice, 99
- rule for, formerly no stay, 100
- where defendant pleads matters arising pending action, 100
- costs of, where plaintiff confesses defence, 100
- where there are issues of law, 102
- after costs of interlocutory application made costs in cause, 102
- costs of, after new trial ordered, 102, 103
- attachment for non-payment of costs of, 103
- what costs allowed as costs of, 104
- form for defendant's costs on, 264

DISCOVERY, *see* tit. DEPOSIT, INTERROGATORIES—

- security for costs of, 138
- deposit by party seeking, 138
- disposal of, 139
- costs of office copy of affidavit of documents of, not allowed, 139
- of ship's papers, no deposit required on, *addenda*

DISCOVERY IN AID OF EXECUTION—

- examination of debtor where judgment or order for recovery or payment of money, 254
- in case of judgment or order otherwise than for recovery or payment of money, 255
- costs of application for, 256

DISCRETION OF JUDGE—

- over costs, no appeal from as a rule, 7
- appeal from, where trial with jury, 7

DISCRETION OF THE MASTERS—

- how to be exercised, 180, 181
- not interfered with in general, 180, 206
- rule on which Court act in considering question of, 181, 182
- as to allowance for costs of commission to examine witnesses, 140
- as to apportionment of costs of issues, 164
- fees to counsel, 206 *et seq.*
- costs of procuring advice of counsel, 212
- discretionary fees and allowances, 211
- special allowances for special indorsements, 212
- settling affidavits, 212
- instructions to sue or defend, 212
- costs of applications to extend time, 212
- allowances for witnesses, 214 *et seq.*, *see* also tit. WITNESSES.

DISCRETIONARY FEES OR ALLOWANCES—

- to counsel or solicitor, 211
- matters to be considered by master when dealing with, 211

DISTRICT REGISTRAR—

- appeal lies to Judge from order of, as to costs, 8
- fees payable on reference before, 333
- fees for examination of witnesses before, 333

DISTRICT REGISTRY—

- fees and rules relating to costs in Supreme Court apply to action commenced in, 178
- where action commenced in, judgment to be signed and costs taxed in, 173

DISTRINGAS NUPER VICE COMITEM—

- writ of, to be issued and executed as formerly, 254

DOCUMENTS, *see* tit. COPIES.—

- costs of proving, after notice to admit or produce, 133, 134
- evidence of admission of, after notice, 133
- unnecessary, costs of notice to admit or produce, 134
- costs of proving, rejected at trial, disallowed on taxation, 135
- expenses of witness producing original, 135
- expenses of procuring secondary evidence where documents destroyed by negligence, 135
- costs of stamping, not allowed, 135
- costs of copies of, for use at trial, 135
- notice to produce, where referred to in pleadings or affidavits, 137
- charges for copies of, in possession of third party, 138
- costs of office copy of affidavit of, not allowed, 139
- order to person to attend examination and produce, 141
- order to officer of corporation to produce, 119
- unnecessary extracts from, set out in affidavits disallowed, 192
- power of Court or Judge to make order as to party to bear expenses of printing, 204
- allowance for printing foreign, 205, 283
- fee on application for officer of Court to attend and produce, 325

DOUBLE COSTS—

- abolished, 213
- exception, 213
- substitution of indemnity for, 213
- mode of calculating, when given, 214
- double damages included double costs, 214
- exception, 214

DRAWING—

- indorsements, pleadings or other documents, allowances for, 193, 212, 282
- briefs, charges by solicitor for, 199, 283
- allowances provided by the scale for, 282

ELEGIT, WRIT OF—

- effect of, 253
- to be executed as heretofore, 253
- extends to whole of debtor's lands, 253
- does not extend to goods, 253
- sheriff's fees on, 253, 304
- poundage on, 253
- poundage fees and expenses of execution of, may be levied over and above sum recovered, 253

ESTATE—

- taxation of costs to be borne by, 169

EVENT—

- meaning of term generally, 9, 10
- costs follow, as a rule, where action tried with jury, 9
- exceptions, 9
- where money paid into Court, 11, 12
- in some cases is *complex*, 12
- where several causes of action to be construed distributively, 13
- where several events, costs to be apportioned, 13
- costs where claim and counterclaim, 14
- where counterclaim overtops claim, 15
- costs where there are several issues, 16
- judgment for defendant for balance, 17
- costs follow, where action tried in County Court by order, 18
- where plaintiff discontinues after new trial ordered, 102, 103

EVIDENCE, *see* tit. DOCUMENTS, EXPERTS, WITNESSES—

- if witness disallowed, parts of brief relating to his evidence also disallowed, 201
- maps, models, plans, for use at trial allowed, 135, 218
- expenses of witness qualifying to give, allowed, 217

EVIDENCE (*continued*)—

- test is whether expenses reasonably incurred, 218
- scientific witnesses, 217, 218
- searches for pedigrees, 218
- translations of ancient documents, 218

EXAMINATION OF WITNESSES—

- by order of the Court, 140
- conduct money to be allowed, 140
- costs occasioned by witness refusing to attend, be sworn, or answer any question, 141
- validity of objection to question, how decided, 141
- fees payable on, 328, 333
- before examiner of Court, *addenda*
- how taken, 313

EXECUTION—

- see* tit. DISCOVERY IN AID OF, 254
- order of Court or Judge may be enforced by, 249
- immediate, as a general rule, 249
- except where judgment or order payment within a fixed, 249
- where execution stayed by Court or Judge, 249
- separate writs of, may be sued out for recovery of sum and for recovery of costs, 249, 255
- second writ only to be for costs, 249
- may be issued, when, 249
- on judgment other than for payment of money or costs, 250
- for recovery of land, 250
- must issue within six years after judgment recovered, 250
- leave to issue, necessary after six years, 250
- where execution by or against husband on judgment for or against wife, 250
- upon judgment of assets *in futuro*, 250
- upon judgment against shareholders of company, 250
- costs of, 250
- indorsement of writ of, with direction to sheriff, 252
- form of writ of *fi. fa.* on order for costs, 266
- for the various writs of, *see* titles

EXECUTOR AND ADMINISTRATOR—

- costs where plaintiff sues as executor, &c., 35

EXECUTOR AND ADMINISTRATOR (continued)—

- costs where defendant is sued as executor, &c., 35
- effect of plea of *plene administravit*, 35
- costs on judgment on plea for plaintiff or defendant, 36
- costs of plea of *plene administravit prater*, 36
- execution on judgment of assets in *futuro*, 36
- power of Court or Judge over costs of execution, 36
- married woman can sue alone or jointly as executrix or administratrix, 40
- security for costs not required in action by, 76

EXHIBITS—

- allowances provided by the scale for, 288
- fees payable on filing, 326
- how taken, 312

EXPENSES OF EXECUTION—

- meaning of term, 250

EXPERTS, see tit. EVIDENCE, WITNESSES—

- allowance to, for qualifying to give evidence, 217, 218

EXTRA COSTS—

- unsuccessful party not liable for, 186
- not recoverable, as damages, 256

EXTRAORDINARY COSTS—

- rule or order for costs should include, 188

FIERI FACIAS—

- writ of, effect of, 253
- when issuable, 249
- separate writs of, for money or for costs, 249, 255
- indorsement of writ of, with direction to sheriff, 253
- discovery in aid of execution, *see tit.*
- form of writ of, on order for costs, 266

FI. FA. DE BONIS ECCLESIASTICIS—

- writ of, when issuable, 253
- practice as to execution of, 254

FOLIO—

- comprises seventy-two words, 199, 324

FULL COSTS—

- costs taxed as between party and party, 37, 186
- no distinction in law between costs and full costs, 38

FUND—

- taxation of costs to be borne by, 169, 170
- total amount of costs to be stated in allocatur when costs to be paid out of, 169

GARNISHEE ORDER—

- costs of, in discretion of Court or Judge, 246
- debts due to judgment-debtor attachable, 247
- order for costs now attachable, 247
- service of, binds debts, 247
- execution may, by order, issue if garnishee does not pay amount of debt into Court, 247
- practice where garnishee disputes liability, 248
- where third party claims debt sought to be attached, 248
- claim of third party may be barred, 248
- discharge of garnishee, 248
- debt attachment book to be kept, 248
- appeal from, 248

GOOD JURY—

- fees payable to, 156
- obtained by Judge's order upon writ of inquiry, 156

HIGHER SCALE—

- costs on, allowed only by order of Court or Judge, 177, 178 n. (a).
- allowed on special grounds on taxation between solicitor and client, 178

IGNORANCE OF SOLICITOR—

- disentitles him to costs of proceedings erroneously brought, 191

INDEMNITY, see tit. SURETY.**INDORSEMENT, see tit. STAYING PROCEEDINGS, WRIT OF SUMMONS.****INFANT, see tit. NEXT FRIEND—**

- party to bear costs where solicitor of Court appointed guardian *ad litem*, *addenda*.
- security for costs not required from next friend if insolvent, 84

INQUIRY, WRIT OF—

- assessment of damages by, on judgment by default, 110, 111
- must be executed, before costs can be taxed, 111
- costs of the day on, 146
- good jury upon, obtained by Judge's order, 156
- number of counsel allowed upon, 210
- sheriff's fees for executing, 305

INSPECTION, *see* tit. DISCOVERY, INTERROGATORIES—

- costs of, 136 *et seq.*

INSTRUCTIONS—

- to sue or defend, special allowances for, 212
- for affidavit in answer to interrogatories, allowance for, 193
- special allowances for, 193
- for brief, allowance for in discretion of master, 197, 198
- special allowances for, 200

INTEREST—

- on judgment where execution delayed by appeal, allowed, 159
- but not on costs of appeals, 179
- on costs runs from date of allocation, 179
- amount of, due on judgment to be indorsed on writ of execution, 252

INTERLOCUTORY COSTS—

- costs of interlocutory proceedings not otherwise provided for are costs in cause, 149
- lump sum in lieu of taxed, 184
- set-off of, between party and party, 230

INTERPLEADER PROCEEDINGS—

- security for costs in, 85
- disposal of claim in summary manner, 244
- costs of, generally reserved until proceedings determined, 244
- where order made on application of the sheriff, 244
- where sheriff no authority from execution-creditor to contest claim, 245
- where sheriff ordered to withdraw, 245
- where summons taken out by defendant in action, 245

INTERPLEADER PROCEEDINGS (*continued*)—

- where claimant does not appear, 245
- where sheriff delays to interplead, 245
- where application of sheriff is frivolous, 246
- where neither plaintiff nor claimant appears, 246
- where claimant abandons claim after issue ordered, 246
- power of Court or Judge, who tries issue, over costs not otherwise provided for, 245
- apportionment of costs of, 246
- execution for costs of, 246
- forms of orders in, 271, 272

INTERPRETER—

- expenses of, to attend trial allowed between party and party, 218

INTERROGATORIES, *see* tit. DEPOSIT—

- costs of improperly exhibiting, 137, 225
- insufficiently answered, 137
- unnecessary, to be disallowed, 171
- security for costs of, 138
- deposit by party who delivers, 138
- cannot be dispensed with, 139
- disposal of sum deposited, 139
- costs of instructions and drawing affidavit in answer to, 193
- attendance on deponent to be sworn, 193

IRREGULARITY—

- costs of setting aside proceedings for, 132
- where summons dismissed generally without special direction as to costs, 132, 150
- application to set aside proceeding for, to be made within reasonable time or before step taken after notice of, 132

ISSUES, *see* tit. ISSUES OF LAW AND FACT, APPORTIONMENT OF COSTS—

- costs of several, follow event of issue, 92, 163
- apportionment of costs of, 163 *et seq.*
- costs of, to which successful party entitled, 163, 165
- where party unsuccessful, 163

ISSUES (*continued*)—

- costs of, where plaintiff nonsuited, 165
 - where there is a claim and counterclaim, 165
 - where there are several defendants, 165
 - where defendants defend by separate solicitors, 166
 - where name of one of several defendants struck out at trial, 166
- to be construed distributively, 166
- defendant may tax costs of, found in his favour though plaintiff deprived of costs, 165
- payment of costs where there are several defendants, 167
 - when ordered to be paid to a particular defendant, 167
- no costs where juror withdrawn, 167
 - where jury discharged as to particular issues, 167
- judgment for excess of costs of, 165

ISSUES OF FACT WITHOUT PLEADINGS—

- may be tried by consent or order, 96
- order for money to be paid upon finding, with or without costs, 97
- judgment to be entered upon finding, 97
- proceedings upon, either party may record, 97
- judgment upon, whether recorded or not, effect of, 97

ISSUES OF LAW—

- mode in which points of law raised and disposed of, 92
- costs of, follow event respectively, 92
 - effect of County Courts Act on plaintiff's right to, 93
 - where both issues of fact and law, 92, 93
- discontinuance by plaintiff after judgment in his favour on, 94
- taxation of costs where issue goes to whole action, 94
- one taxation only where issue goes to part only, 94
- number of counsel allowed on argument in Q. B. Division, 94
- in Court of Appeal, 94
- what costs are allowed upon taxation, 94

JOINDER—

- of several causes of action by plaintiff, 121, 123
 - in action for recovery of land with leave only, 123
- of joint and several claims, 123
 - claims by trustee, 123
 - claims by or against husband and wife, 123
 - claims by executor, 123
 - application to sever inconvenient claims, 124
- costs of inconvenient, of claim, 124

JOURNEY—

- unnecessarily taken by solicitor disallowed on taxation between solicitor and client, 189

JUDGE'S CHAMBERS—

- procedure on non-attendance on summons at Judge's Chambers, 131
- costs where no wilful delay or negligence in attending summons at, 131
- costs of non-attendance on summons, 132
- where party not interested appears on summons, 131
- costs where order of Judge at chambers reversed, 144

JUDGE'S NOTES—

- party to bespeak, 143
- fee on application to produce, 337
- how to be taken, 318

JUDGE'S ORDER—

- costs follow reversal of, 144
- recovery of costs payable under, 249

JUDGMENT—

- allowance of fixed sum for costs of, 118, 207, 211
- where writ specially indorsed, leave to sign, 118
 - in action for recovery of land, 118
 - application for, how made, 118
 - order for, if no defence on merits, 119
 - no order for, if defendant brings money into Court, 119
 - judgment for part of claim, 119
 - leave to defend where several defendants, 119

JUDGMENT (*continued*)—

order for examination of defendant or officer of corporation, 119
 form of order for, under Order 14, 262
 interest on, where execution delayed by appeal, 159
 final, to be signed in district registry if action commenced there, 173
 for excess of costs may be signed by defendant, 165
 execution on, by default of pleading not to issue without leave where counterclaim, 115
 setting aside, where default of pleading, 115
 form of, in pursuance of order, 264
 where no judgment entered at trial by jury, 265
 fee on registering or re-registering, 336
 fee on certificate of entry of satisfaction, 336
See also tit. TRIAL.

JURISDICTION—

security for costs where plaintiff out of, 70, 71 *et seq.*
See tit. SECURITY FOR COSTS.

WRIT—

on withdrawal of, neither party entitled to costs, 167

WRIT, *see* tit. SPECIAL JURY—

rule as to costs where action tried with, 9
 where tried without, 3
 view by, costs of, 154
 fees payable to, 156
 good jury, 156
 costs when discharged, as to particular issues, 167
 must be sworn to entitle defendant to costs of, as costs of day where plaintiff nonsuited, 148

JUDGES OF THE PEACE—

limitation of action against, 48
 notice of action, 48
 tender of amends by, 48, 69
 costs on tender of amends by, 48
 costs as against plaintiff generally, 49
 costs as against defendant generally, 49
 proceedings may be set aside in prohibited action, 49

LAND, RECOVERY OF—

specialty indorsed writ in action for, 45
 judgment under Order 14, 45
 costs on default of appearance where claim for land only, 45, 111
 where several causes of action joined, 45
 where defendant fails to deliver any defence, 46
 defence delivered to part only of claim, 46
 execution not to issue on judgment by default without leave where counterclaim, 46
 on judgment or order for, and costs may be by one or separate writs, 46, 118
 staying proceedings on payment of rent and costs, 47
 in second until costs of first action paid, 47
 security for costs where second action is for same premises, 47
 where tenant holds over, 87
 where plaintiff out of the jurisdiction, 86
 where party not named in writ let in to defend, 87
 payment of successful defendant's costs by claimant not named in writ, 47
 costs where there are several defendants, 47
 form of judgment on default of appearance in action for, 262

LEAVE TO DEFEND—

where writ specially indorsed, 119
 may be granted if money brought into Court, 119
 where there are several defendants, 119

LEGAL EVENT—

where costs directed to abide event, 92

LETTERS—

allowance for, in agency causes, 222, 288
 where no proceeding carrying term fee, 222, 289
 additional allowances for postages, 222, 289

LETTER BEFORE ACTION—

costs of one letter for payment allowed, 222

LIBEL—

costs in action of, follow event, unless otherwise ordered, 9
 not affected by County Courts Act 1867, 20
 payment into Court in action for, in newspaper, 65

LIEN—

payment into Court of sum for interest and costs to abide event of claim of, 83, and *addenda*

LIEN OF SOLICITOR—

set-off for costs or damages allowed, as between party and party, notwithstanding, 186, 230
 compromise by parties to prejudice of, 231
 after notice of lien, 231
 by collusion or fraud, 231
 where client sues as pauper, 232
 lien upon judgment, 232
 deeds or papers, 232
 order for attachment of debt takes precedence of general lien of solicitor, 234
 cessation of, 232
 how waived or lost, 232
 lien of agent, 232

LIMITED COMPANY—

security for costs, when required from, 78

LIS PENDENS—

fee on registering or re-registering, 336

LOWER SCALE—

costs to be taxed generally on, 177

LUNATIC—

security for costs where plaintiff is, 84

MALICIOUS PROSECUTION—

action for, not within County Courts Acts, 20
 to recover costs of, as damages, 257
 allowance of short-hand notes of evidence at trial of, as instructions to counsel, 228

MANDAMUS—

claim for, to be indorsed on writ, 41
 costs in action of, recoverable by either party as in ordinary action, 41

MANDAMUS (continued)—

defendant in action of, may be commanded forthwith or on terms to perform duty, 41
 time for performance of duty may be extended by Court or Judge, 41
 no writ of m. now issued in an action, 41
 to be by judgment or order, 41
 effect of judgment or order same as writ of m. formerly, 41
 party not complying with m. guilty of contempt, 41
 where not complied with, Court or Judge may order party obtaining judgment or order to do act required, 41
 disobedient party to pay the costs, 41
 mode of ascertaining amount of expenses, 41
 execution may issue for amount ascertained, 41
 fee on sealing writ of, 324

MAPS—

for use at trial, allowance for, 135, 218
 fees for copies of, 325
 how to be taken, 311, 314

MARRIAGE—

action for breach of promise of, not within County Courts Act, 20

MARRIED WOMAN—

can sue and defend as *feme sole* in contract or in tort, 39
 liable on any contract to extent of separate property, 39
 not necessary to join husband as plaintiff or defendant, 39
 in certain cases husband and wife may be jointly sued, 40
 damages or costs recovered by, to be separate property, 39
 against, payable out of separate property, 39
 extent of liability for antenuptial debts, 39
 may sue or defend alone or jointly as executrix, administratrix, or trustee, 40
 rights and liabilities of legal personal representative of married woman, 40
 security for costs, 40, 84

MASTERS, *see* tit. DISCRETION OF MASTERS—

- powers and authority of, 168-173
 - as to taxation of costs, 168
- preservation of certain powers of, 168
- to be respectively assistant to each other, 169
- at chambers have no power to review taxation, 173, 180
 - have power only to award costs of proceedings before them, 173, and *addenda*
- have power to limit or extend time for any proceeding before them, 172
- attendance of, to tax costs, 169
- can only tax on judgment or order, 168
- actions now assigned to particular, 169
- to whom action assigned to tax costs thereof, 169
- taxation by, where bill of costs forms part of an account, 168
 - where costs payable out of fund or estate, 169
- reference of costs to, for inquiry, 170
- appeal lies to Judge from order of, as to costs, 8

MESNE PROFITS—

- claim for, may be joined with claim for land, 45
- action for, to recover costs of default of appearance in action for recovery of land, 45, 111
- default of pleading, on claim for land and mesne profits, 114

MODELS—

- for use at trial, allowance for, 135, 218

MORTGAGEE—

- stay of proceedings in ejectment by, where mortgagor brings principal, interest, and costs into Court, 117

MOTION, *see* tit. NEW TRIAL—

- costs of, generally, 143
 - where person not a party served with notice of, 143
 - party does not appear in support of, 143
 - appears to invalid notice of, 143

MOTION (*continued*)—

- where Court has no jurisdiction to entertain, 144
- costs follow reversal of order of Judge at chambers, 144
- form of judgment on, after trial of issue, 266

MUNICIPAL CORPORATIONS ACT, 1882—

- no action to be brought after six months from date of cause of action, 38
- tender of amends, 38, 69
- effect on plaintiff's costs of tender and payment into Court, 38
- fund out of which defendant's costs to be paid, 38
- burgess only can sue for fine for acting in corporate capacity when unqualified, 38
- notice of action necessary, 39
- security for costs, 38, 87
- defendant's costs taxed as between solicitor and client, 39
- plaintiff entitled to moiety of fine after payment of costs of action, 39
- action lies for penalty for corrupt practices at municipal election, 39

NEGLIGENCE—

- personal liability of solicitor for costs incurred, by 190 (*see* tit. SOLICITOR)

NEW TRIAL—

- costs of discontinuance after order for, 102, 103
- costs of, generally, 142
- motion for, to be made to Divisional Court where trial with jury, 142
- to Court of Appeal where trial without jury, 142
- amendment, upon terms, of notice of motion for, 142
- costs of first trial follow event of new trial, 142
 - former practice was otherwise if event not the same in both trials, 143
- costs where Court divided in opinion on application for, 143
- party to bespeak Judge's notes taken at trial, 143
 - fees on application to produce notes, 143, 337
 - how to be taken, 318

NEXT FRIEND—

- personally liable to infant plaintiff for costs, 36
- although liable for costs, is not party to action, 36
- prima facie* liable for solicitor's bill of costs if his name lent as next friend, 37
- not generally liable for costs of action unsuccessfully defended, 37
- security for costs not required from infant where next friend insolvent, 37, 84
- is appointed by Court, therefore no security required, 84

NOLLE PROSEQUI—

- effect of, 107
- costs on, after payment into Court, 65, 107
- as to whole or part of claim, 107
- as to one or more of several defendants, 107

NONSUIT, JUDGMENT OF—

- effect of, 105
- costs in case of, 106
- costs of, in penal action, 106
- in action for recovery of land, 106
- after payment into Court, 65, 106
- where there are several issues, 106, 165
- certificate for special jury in case of, 106
- setting aside, on payment of costs, 106

NOTICE OF ACTION—

- costs of giving, when required by statute, allowed as costs in the cause, 151, 222
- when costs of, limited by statute, 223

NOTICE OF TRIAL—

- countermand of, by consent or leave of Court or Judge, 145
- costs where party does not appear at trial pursuant to, 145
- where plaintiff does not proceed to execute writ of inquiry, 147
- costs of preparing for trial before notice given, disallowed, 198

NOTICE TO ADMIT—

- costs of proving documents after, 133
- unnecessary documents, costs of, 134, 225

NOTICES DURING ACTION, see tit.**SERVICE OF NOTICES—**

- extra costs occasioned by unnecessary, disallowed as between party and party, 187
- all necessary notices and copies given during action allowed as costs in cause, 151, 223
- allowance where notice served at distance from solicitor's office, 223
- where service effected through agent, 223, 224
- service of second notice of adjournment or appointment, when disallowed, 224
- mode of effecting service of notices, 224

NOTICE OF TAXATION—

- one day's notice sufficient, when necessary to be given, 174
- not necessary where defendant has not appeared, 174
- service of, how effected, 174
- affidavit of service of, requisites of, 174
- effect of want of, where it ought to be given, 175

OATHS AND EXHIBITS—

- allowances provided by scale for, 288
- fees on taking, 326
- to be taken by stamps, 311, 312

OFFICIAL REFEREE—

- fees in proceedings before, 334

OFFICIAL SOLICITOR—

- costs of, provision for, 191

PARTIES—

- claims by plaintiffs, jointly, severally, or in alternative, 121
- joinder of defendants where, 121
- substitution of real for wrong plaintiff, 121
- misjoinder of plaintiff where counterclaim set up, 121
- defendant not wholly interested may be joined, 122
- joinder of defendants severally or jointly and severally liable, 122
- two or more defendants where plaintiff in doubt, 122
- misjoinder or non-joinder of, costs of, 122
- application to strike out, 123
- change of, by death, marriage, operation of law, 123

PATENT—

costs in action for infringing letters patent, 47
 proof of particulars to be certified by Judge, 48
 taxation of costs of action, 48

PAUPER—

within operation of County Courts Act, 23
 admission to sue or defend as, 41
 degree of poverty necessary, 42
 case for counsel, 42
 case to be produced before Court, 42
 no fees payable to counsel or solicitor, 42
 no Court fees, 42
 assignment of counsel or solicitor to, 42
 person taking fee from, guilty of contempt, 42
 giving fee, to be dispaupered, 42
 date from which order to proceed as, takes effect, 42
 formerly not entitled to costs except by order of Court or Judge, 43
 taxation of costs ordered to be paid to, 43
 after admission not liable to defendant for any costs, 43
 not liable to pay either interlocutory or final costs, 43
 liable formerly to pay costs of day, failing to proceed to trial after notice, 43, 147
quare whether now liable for costs of day, 147
 could not formerly amend pleadings after demurrer without payment of costs, 43
 liable to solicitor for necessary disbursements, 43
 recovers expenses actually paid to witnesses, 44
 set-off of costs in action by, 44
 compromise by, to defeat solicitor's lien, 44, 232

PAYMENT INTO COURT—

in satisfaction, 58
 in alternative, 58
 in action on bond, 58
 must be pleaded, 58
 notice to plaintiff of payment in, 58
 form, 58
 money payable out to plaintiff if paid in before defence, 59
 or in satisfaction, 59
 or with plea of tender, 59

PAYMENT INTO COURT (*continued*)—

stay of proceedings where plaintiff takes out money in satisfaction, 59
 form of payment out on acceptance, 59
 money remains in Court if plaintiff refuses to accept, 59, 60
 balance, if any, to be paid to defendant, 60
 repayment of whole amount to defendant if successful, 60
 plaintiff entitled to costs on accepting money paid in, 60
 can sign judgment for taxed costs, 60
 tax costs only where amount accepted in full satisfaction, 61, 62
 plaintiff's right to costs where he fails to take money out within four days, 60
 effect of County Courts Act, 1867, s. 5, 61
 former practice as to payment in, 61
 money paid in by mistake, 61
 taken out by mistake, 62
 costs where only issue as to sufficiency of sum paid in, 62
 exceptions, 62, 67
 payment in, as to part of claim only, 62
nolle prosequi as to residue of claim where money paid in accepted by plaintiff, 63
 illustrations, 63, 64
 effect upon costs of payment in with denial of liability, 64
 non pros. 65, 107
 verdict for defendant, 65
 withdrawal of juror, 65
 costs of nonsuit, after payment in, 65, 106
 payment in where actions consolidated, 65
 money may be paid into Court to counterclaim, 65
 payment in, in action of replevin, 65
 in action for libel in newspaper, 66
 in remitted action, 66
quare whether payment in with plea of justification allowable in action of libel, 66
 payment in, in actions under 8 & 9 Vict. c. 93, 67
 form of judgment for costs after acceptance of money paid in, 265
 regulations as to, and taking out same, 273 *et seq.*

PAYMENT OF COSTS—

on, when expression amounts to condition or words of agreement only, 148 n. (c)

PENAL ACTION—

for corrupt practices at Municipal election, 39
security for costs in, 87

PERUSALS—

fees for, not applicable where same solicitor for both parties, 224
allowances for, 224, 225
scale of, 284

PLAINTIFF—

right of, to costs generally, 1 *et seq.*
may be ordered to pay costs, although successful in action, 3
may be deprived of costs under County Courts Act, 21
costs of, in pauper action, 22
costs on County Court scale where £50 or less recovered in action of contract, 31, 208, and *addenda*
non-joinder or misjoinder of, costs of, 122
when liable for costs of day, 147

PLANS—

for use at trial, allowance for, 135, 218
fees for copies of, 325
how to be taken, 311, 314

PLEADINGS—

costs of copies of, for use at trial, when allowed, 135
office copies of, 202
notice to produce documents referred to in, 137
allowance for drawing, includes copy, 193
allowances for costs of printing, 203
for drawing, 282
costs of unnecessary prolixity in, party to bear, 225
costs of documents set out in full, sometimes allowed, 225
costs occasioned by not using prescribed forms of, 225
fee for certificate of filing of, 327

POUNDAGE, *see* tit. SHERIFF—

sheriff entitled to, by statute, 250
only where there has been levy, 250

POUNDAGE (*continued*)—

on sum received only, not on amount claimed or seized, 251
if amount marked on writ levied and paid to plaintiff, 251
on a writ of *fi. fa.*, 251
on levy where execution set aside, 251
where parties come to arrangement before sale by sheriff, 251
on a writ of *elegit*, limited to yearly value of land, 253
See tit. ELEGIT.

PRINTING—

evidence for Court of Appeal, costs of, 159
documents ordered to be printed, costs of, 194, 204
party taking and filing affidavit or deposition to print the same, 203
printed office copy of affidavit or deposition to be marked as such, 203
printed copies to be supplied to other party on payment, 203
folios of, to be numbered consecutively, 204
charge for written copy disallowed where party entitled to printed copy, 203
allowance to solicitor of party printing for copy for printer, 205
amount actually paid by solicitor for printed copies properly taken to be allowed, 205, 284
special allowance for document printed in foreign language or as fac-simile, 205, 283
allowances to printer for printing, 205, 283
for printing include attendances on printer, 205, 284
additional allowances for printing and taking printed copies, 205, 284
for printed copies for Court, Judge, or counsel, when not to be allowed, 205, 284
allowance for inserting amendments into printed copies, 205, 284

PROLIXITY—

costs where prolix writs and indorsements used, 225
where pleading prolix, 225
costs of interrogatories struck out because prolix, 225
title of affidavit when unnecessarily prolix, disallowed, 226

PROOF OF DOCUMENTS—

costs of, after notice to admit, 133
 evidence of admission, 133
 costs of notice to admit or produce unnecessary documents, 134
 expenses of witness producing original document, 135
 stamping document, 135
 procuring secondary evidence, 135

PUBLIC HEALTH ACT, 1875—

action under statute, against local authority or any member thereof, 37
 notice of action necessary, 37
 period within which action must be brought, 37
 venue is local, 37
 tender of amends, 37, 69
 payment into Court where tender insufficient, 37
 defendant entitled to full costs if plaintiff nonsuited, 37
 or judgment for defendant, 37
 or jury find generally for defendant on plea to whole action, 37
 "full costs," meaning of, 37

RECOVERY OF LAND, action for (see tit. LAND)**REFERENCE OF SOLICITOR'S BILL OF COSTS to taxation, 236**
*see tit. BILL OF COSTS***REFRESHERS—**

to counsel, 210

REGISTRAR (see also tit. DISTRICT REGISTRAR)

form of judgment on certificate of, of County Court, 264

RELIEF SOUGHT—

when obtainable in County Court, 26 *et seq.*
 effect of County Courts Act upon plaintiff's right to costs, where more than £50 recovered, 28, 30, 32, 33
 where less than £50 recovered, 30, 33

REMANET—

costs of making cause, when costs in the cause, 151

REMITTED ACTION—

costs of, County Court Judge has jurisdiction over, 32
 High Court has no jurisdiction over, 32
 payment into Court allowed in, 66

REPLEVIN—

security for costs in, from defendant, 85
 practice as to signing final judgment for amount of bond, 113 (b)

RETAINER—

master, on taxation, cannot enter into question of, if disputed, 190

RETAINERS TO COUNSEL—

not allowed on taxation between party and party, 208

REVIEW OF TAXATION—

application to Judge for, 179
 time within which, to be made, 179
 evidence on hearing of, 179
 can be made only after allocatur signed, 180
 by master before signing allocatur, 179
 where discretion of master impugned, rule on which Court act when considering application for, 181
 where party taxes and signs final judgment without notice to tax when necessary, 175
 master at chambers has no power to review taxation, 173, 180

SCIENTIFIC PERSONS—

allowances to, where questions referred to, 172

SEARCHES—

Court fees for, 327

SECURITY FOR COSTS—

object of rule requiring, 70
 where plaintiff resident out of jurisdiction, 70
 what constitutes sufficient absence abroad, 70
 not ordered if plaintiff within jurisdiction when application made, 71, 73
 order for, not rescinded when once made and security given, 72

SECURITY FOR COSTS (*continued*)—

- compulsory residence abroad not sufficient ground for order for, 72
- English officers, soldiers, sailors, peers, ambassadors and suite, exempt, 72
- foreign sovereign resident abroad, who trades, not exempt, 73
- not required from persons residing in United Kingdom, 73
- nor from plaintiff where counter-claim founded on distinct cause of action, 74
- nor where several plaintiffs, one of whom is within jurisdiction, 75
- nor where plaintiff has real property within jurisdiction, 75
- nor where action by executor or administrator, 76
- assignee of bankrupt, 77
- nor in actions under Lord Campbell's Act (8 & 9 Vict. c. 93), 78
- nominal plaintiff, resident abroad, and suing for benefit of third party, must give, 76
- where insolvent plaintiff sues as mere nominee, 78, 80
- when to be given by trustee of bankrupt plaintiff, 81
- poverty of plaintiff no ground for order for, 78
- where plaintiff no visible means, case may be sent to County Court, 79
- in replevin, 85
- interpleader, 85
- actions for recovery of land, 86
- penal action under Municipal Corporations Act, 1882, 87
- under Debtors' Act, 1869, 91
- when and how to be given, 88, 91
- application for, to be made by summons, supported by affidavit, 88
- how made formerly, 89
- time from which order for, reckoned, 91
- not confined to future costs, but extends to costs already incurred, 90
- fresh security may be ordered, 90
- action may be dismissed if security when ordered not given, 90
- bond for, to be given to party requiring security, 91
- fee payable on taking, 91, 337
- in Court of Appeal, 159
- form of order to give, or try in County Court, 271

SEDUCTION—

- action of, not within County Courts Acts, 20

SEQUESTRATION—

- writ of, when issuable, 254
- not to be issued for costs without leave, 254

SERVICE OF NOTICES—

- allowances for service or filing in lieu of service, 223, 279
- where notice served at distance from solicitor's office, 223, 279
- by agent, 223, 224, 279
- where several attendances to effect service, 223, 279
- service effected out of jurisdiction, 223, 279
- where more than one notice served together, only one fee allowed for service, 223, 280
- various allowances for, 223, 224
- allowances for service, include copies, unless otherwise provided for, 224, 280
- service of second notice of adjournment or appointment, when disallowed, 224, 280
- mode of effecting service, 224

SET-OFF OF COSTS—

- allowed between party and party, notwithstanding solicitor's lien, 186, 230
- interlocutory costs, 230
- final costs, 230
- where several defendants, some of whom succeed, 230
- costs of different actions, 230
- costs in inferior Courts, 231
- debt may be set off against costs, 231

SHERIFF, *see tit.* POUNDAGE—

- costs of, in interpleader proceedings, 244, 245
- poundage, fees and expenses of, for levying execution, 250, 251, 253
- expenses of execution, meaning of, 250
- extra expenses not allowed to, 251
- penalty for extortion by, or by his officers, 251, 252
- non-liability of solicitor to, for fees, 252
- indorsement of writ of execution with direction to, 252

SHERIFF (continued)—

- saving as to fees of, executing order of arrest under Debtors' Act, *addenda*
- table of fees to be taken by, 303

SHORTHAND WRITER'S NOTES—

- of evidence, not generally allowed, 227
- special direction of Court necessary before allowance made, 227
- of argument, not allowed, 227
- allowance for, when used in Court of Appeal, 227
- application for, to be made before judgment entered, 227
- Court of Appeal has power to allow, if used, whether taken for purposes of appeal or not, 227
- duty of solicitor as to informing client, when about to incur costs of, 228
- allowance for, as instructions to counsel, 228

SHOWERS—

- appointment of, on view, 154
- fees payable to, 154

SLANDER—

- costs in action of, follow event, 9
- action of, not within County Courts Act, 20

SOLICITOR—

- liability of, personally for costs of non-attendance on summons at chambers, 131, 132
- on personal undertaking to pay costs, 191
- for costs incurred improperly, fruitlessly, by undue delay or misconduct, 170
- reference to master to report, 170
- where proceedings ignorantly or negligently taken, 191
- or taken without authority, 191
- allowances where solicitor has more than one place of business, 182, 187
- where solicitor same for both parties, 185
- one solicitor for several defendants, 185
- no costs recoverable where solicitor unqualified, 186
- objection to unqualified solicitor, to be taken on taxation, 186

SOLICITOR (continued)—

- costs of, when suing or defending in person, 187
- duty of, to advise client about to incur unnecessary expenses, 189, 228
- lien of, for costs, 231
- action by, on bill of costs (*see tit. BILL OF COSTS*)
- may take security from client for future fees, charges, &c., 240
- agreement by, for costs (*see tit. AGREEMENT BY SOLICITOR*)
- allowance on higher scale between solicitor and client where bill referred to taxation, 240

SOLICITOR AND CLIENT, *see tit. TAXATION OF COSTS—*

- taxation of costs between party and party as between, 187
- between solicitor and his client, 187
- expenses of drafts settled by conveyancing counsel by direction of Court or Judge not allowed as between, unless otherwise ordered, *addenda*

SPECIAL CASE—

- may be stated by consent of parties, 95
- or by order of Court or Judge, 95
- form in which to be stated, 95
- disallowance of costs incurred by departure from form, 95
- Court may draw inferences of law and fact, 95
- to be printed by plaintiff, 95
- printed copies of, for use of judges, 95
- where married woman, infant, or person of unsound mind is a party, 96
- entry of, for argument, 96
- agreement by parties as to payment of fixed amount and costs, 97
- not subject to stamp duty, 97
- execution may issue on judgment, 97
- fee on filing, 326
- how taken, 312

SPECIAL JURY—

- order for, may be made at any time, 155, 156
- rule for, to be obtained on affidavit, 155
- costs of, discretion of Judge as to, 155

SPECIAL JURY (*continued*)—

discretion not interfered with except on special grounds, 156
costs of, are not costs of the day, 156
certificate for, when to be applied for, 155
where certificate refused, 155
party applying for, pays fees in first instance, 155
fees payable to, 156
where "good jury" on writ of inquiry selected from special jury list, 156

STAMPING DOCUMENTS—

expenses of, not allowed on taxation between party and party, 135

STAMPS—

duty of Court officials to cancel, 322

STAYING PROCEEDINGS—

on payment by defendant of debt or liquidated demand and costs indorsed upon writ, 116
costs may be taxed, 116
even where plaintiff accepts payment within four days, 117
where defendant pays less sum than that indorsed on writ, 118
where plaintiff's claim on writ is excessive, 116, 117
indorsement is obligatory, but may be amended, 116
in action on bill, 117
bond, 117
judgment, 117
ejectment by mortgagee, 117
practice as to, 117
on payment of claim and costs, where several actions by underwriters consolidated, *addenda*

STET PROCESSUS—

costs on, 107

SUBPENA—

for costs, not to be issued, 249, 254
fee on sealing writ of, for witnesses, 324

SUBSISTENCE MONEY—

allowance for, in discretion of master on taxation, 220
principle upon which allowance made, 220
foreign witness, 221

SUBSISTENCE MONEY (*continued*)—

question whether witness brought over for purpose of cause, is for master to decide, 221

SUMMONS FOR DIRECTIONS (*see tit. DIRECTIONS*).SUMMONS TO STAY PROCEEDINGS (*see tit. STAYING PROCEEDINGS*).SUMMONS, writ of (*see tit. WRIT OF SUMMONS*).

SURETY—

recovery of costs by, as damages, 257
costs recoverable by joint surety, 258

TALESMEN—

fees payable to, 157

TAXATION OF COSTS—

the various modes of, 184
between party and party, 184
to what costs confined, 184
usual allowances by master upon, 184
unnecessary costs not allowed, 185
allowances where same solicitor for both parties, 185
where one solicitor for several defendants, 185
lump sum in lieu of taxed interlocutory costs allowed, 184
set-off of costs and damages as between, 186
extra costs not payable as between, 186
of service of unnecessary notices disallowed, 187
full costs taxed as between, 186
no costs recoverable as between, where solicitor unqualified, 186
money paid sometimes recoverable as between, 187
objection that solicitor unqualified to be taken on taxation between, 186
allowance where solicitor has two places of business, 182, 187
where party sues or defends in person, 187
where solicitor sues or defends in person, 187
expenses of drafts settled by conveying counsel not allowed without order, *addenda*

TAXATION OF COSTS (*continued*)—

the like as between solicitor and client, 187
 principle on which costs taxed, 187, 188
 certain costs not allowed, 188
 journeys, 188
 witnesses, 188
 counsel, 188
 order or rule of Court should include extraordinary costs, 188
 between solicitor and his client, 189
 unnecessary costs and expenses not allowed, 189
 shorthand notes, 189
 extra counsel and fees, 189
 duty of solicitor as to advising client about to incur, 189
 costs of application to strike out scandalous matters in affidavits payable, 192
 different principle on which costs taxed as between, and party and party, 190
 master to determine whether business necessary, 190
 but not whether beneficial, 190
 costs of proceedings ignorantly or improperly taken by solicitor disallowed, 191
 or taken without authority, 191
 liability of solicitor personally for costs incurred improperly, negligently, or by misconduct, 190
 reference to master for inquiry, 170, 190
 notice of, to client, 191
 on undertaking, 191
 expenses of drafts settled by conveyancing counsel of Court not allowed as between, without order, *addenda*
 costs of, where party tenders costs before taxation, 172
 where party guilty of neglect or delay on taxation, 172
 allowances for, 182, 183
 where one-sixth taxed off, 183, 236
 order referring to taxation unnecessary where action or motion dismissed with costs, 172
 where costs given by general or special order, 172
 power of master to limit or extend time for, 172
 where final judgment entered in district registry, 173
 master at chambers cannot review, 173 (*see also tit. REVIEW OF TAXATION*)

TAXATION OF COSTS (*continued*)—

Court will not make order as to principle on which costs to be taxed, 180
 fees payable on, 335
 for certificate of result of, 331
 how to be taken, 315

TENDER—

when pleaded, money to be paid into Court, 58
 plaintiff not entitled to costs if he takes money out of Court, 67
 if issue joined on plea, costs follow result of issue, 67
 of amends, in actions against Justices of Peace, 68
 special constables, 68
 parish constables, 68
 county police, 69
 metropolitan police, 69

TERM FEES—

allowed after appearance entered, 228
 where proceeding taken in cause or matter, 228
 former practice as to allowance, 228, 229
 allowance provided by scale for, 288

THIRD PARTY—

leave to serve, with notice, 124
 contents of notice, 124
 form of notice, 124
 appearance by, 124
 default of, admits judgment against defendant, 125
 where plaintiff afterwards successful, 125
 judgment by default of appearance by, and defendant, 125
 trial of questions as between, and defendant, 125
 leave to, to defend action or appear at trial, 126
 costs as between, and other parties to be decided by Court or Judge, 126
 notice to co-defendant treated as, 126
 may be ordered to pay costs of unsuccessful defendant, 126
 costs of, may be ordered to be paid by defendant where action settled, 126

TIME—

costs of application to extend, in discretion of taxing master in general, 131, 212

TIME (continued)—

Costs of one extension of, to be allowed unless master satisfied of necessity of more, 131, 212

TORT—

test as to whether action founded on, 23, 24, 25
effect of County Courts Act upon plaintiff's right to costs in action of, 21, 32 *et seq.*

TRAVELLING EXPENSES—

allowances to witnesses for, 216

TREBLE COSTS—

abolished, 213
substitution of indemnity for, 213
mode of calculating, when given, 214
treble damages included treble costs, 214
exception, 214

TRIAL—

party to bespeak Judge's notes taken at, on motion for new trial, 143
fees payable for notes, 143, 331
how taken, 322
costs where cause struck out at, 146
form of judgment after, with jury, 263
without jury, 263
of questions of fact by referee, 263
where none entered at trial with jury, 265
on motion after trial of issue, 266
fee for certificate of result of, how taken, 314

VENDITIONI EXPONAS—

writ of, when issuable, 253

VIEW—

order for, may be obtained *ex parte* by consent of the parties, 153
rule for, how obtained, 153, 154
appointment of showers, 154
deposit to be made with under sheriff for expenses of, 154
scale of fees to be paid out of, 154
disposal of balance of, 154

VISIBLE MEANS—

case may be sent to County Court where plaintiff has not, 79

WARRANT OF ATTORNEY—

must be filed before judgment signed, 202
fees payable on filing, 202, 326
to be paid by stamp, 202, 312

WARRANTY OF AUTHORITY as agent—

recovery of costs as damages in action for breach of implied, 258

WITHDRAWAL OF JUROR—

costs on, 167
after payment into Court, 65

WITNESSES—

expenses of producing witness on *hab. corp. ad test.*, costs in cause, 151
allowance for, in discretion of master, 214
number of, to be allowed, in discretion of master, 214
reasonable expenses of, at trial allowed, 214
if not present at trial, disallowed, 215
if present at trial, allowed, although not called, 215
should be countermanded if rendered unnecessary by alteration of pleadings, 215
expenses of, arriving after cause referred, disallowed as costs in cause, 215
at reference are costs of reference and not of the cause, 215
when rejected at trial or by arbitrator, disallowed, 215, 220
when supporting successful and unsuccessful issues, allowed, 215
although not subpoenaed may be allowed, 216
if subpoenaed on both sides not entitled to any larger allowance on that account, 216
attendance of party as witness, 216
solicitor called as witness, 216
travelling expenses, 216
attendance by, in several actions, 217
no allowance for contingent losses by, 217
deposit of expenses of officer of Central Office as witness, 217, 325
undertaking to pay further expenses not answered by deposit, 217, 326
scientific witnesses, 217

WITNESSES (*continued*)—

- expenses of, qualifying to give evidence, allowed, 217
- test is whether expenses reasonably incurred, 218
- interpreter allowed, 218
- maps, plans, and models allowed, 218
- time of attendance of witnesses, 219
- professional witnesses, 219
- expenses of, when examined before arbitrator allowed, 219
- allowance for detaining a witness, 220 (*see* tit. SUBSISTENCE MONEY).
- principle upon which allowance made, 220
- foreign witness, 221
- materiality of, must be sworn to, 176, 221
- question of materiality is for master on taxation, 221
- if no affidavit of increase, expenses are limited, 176
- expenses of, must have been actually paid before the master will allow them, 176, 221
- old scale of allowances for, 299
- fee on sealing writ of subpoena for, 324
- fees on examination of, by officer of Court, 328

WORK AND LABOUR—

- allowances for, when properly performed, 229

WRITS OF EXECUTION—

(*See* tit. DISTINGAS NUPER VICE COMITEM, ELEGIT, EXECUTION, FIERI FACIAS, FIERI FACIAS DE BONIS ECCLESIASTICIS, SEQUESTRATION, VENDITIONI EXPONAS).

fee on sealing, 325

WRIT OF SUMMONS—

- stay of proceedings on payment of debt and costs indorsed on, 116
- taxation of costs where proceedings stayed, 116, 117
- amendment of indorsement on, 116
- final judgment under Order 14, where specially indorsed, 118, 119
- where several writs served together, one fee only for service allowed, 223, 280
- costs occasioned by use of prolix forms of, or indorsements on, 225
- form of indorsement on, for costs, 261
- fee on sealing, 324
- where writ concurrent, amended or renewed, 324
- how taken, 319, 320

11-11-11

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